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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

MILLER BREWING COMPANY, a Wisconsin corporation,
Appellant,

v.

THEODORE JONES as Director of Revenue of the State of Illinois.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

STATEMENT AS TO JURISDICTION

Appellant, MILLER BREWING COMPANY, a Wisconsin corporation, appeals from the final order and judgment of the Supreme Court of Illinois entered September 21, 1966, denying Appellant's Petition For Rehearing and from its opinion and decision entered May 23, 1966, affirming a final order of the Circuit Court of Cook County, Illinois. The lower court had held that Appellant's Amended Complaint seeking injunctive and other equitable judicial relief against Appellee and his predecessors in office was substantially insufficient in law and equity to support its cause of action against the Illinois Director of Revenue.

(a)

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (Appendix B, *infra*, p. 2a) has been officially reported and appears at 35 Ill. 2d 86 (1966) and at 219 N.E. 2d 494 (Ill. 1966). The decision of the Circuit Court of Cook County, Illinois (Appendix D, *infra*, p. 12a) is not reported.

On November 10, 1964, the United States District Court for the Northern District of Illinois entered an opinion and decision (Appendix E, *infra*, p. 14a) in a predecessor case which Appellant had filed seeking federal injunctive relief. While that opinion and decision is not reported, it is included in the Appendix so as to assist the Court more fully to understand the substantial nature of the penalty question presented as a second and independent issue on this appeal.

(b)

GROUNDS ON WHICH JURISDICTION IS INVOKED

After the United States District Court for the Northern District of Illinois had dismissed Appellant's action without prejudice for reasons set out in its Opinion (Appendix E, *infra*, p. 14a), Appellant brought this action in the Circuit Court of Cook County, Illinois seeking permanently to enjoin the Illinois Director of Revenue from assessing the use taxes at issue on this appeal and also from assessing certain penalties equal to 25% of said use taxes and related service use taxes against it. Appellant alleged in its Amended Complaint that the Illinois Use Tax Act (Ill. Rev. Stat. 1963, c. 120, Secs. 439.1-439.22) was unconstitutional as applied to Appellant in that as so applied said use taxes violated the Due Process and Commerce Clauses of the United States Constitution and also extended the taxing jurisdiction of the State of Illinois to events occurring and privileges exercised exclusively outside of the State of

Illinois. Appellant further alleged that imposition of penalties equal to 25% of said use taxes and service use taxes is repugnant to the Due Process Clause of the United States Constitution in that they constitute a surcharge against Appellant because it sought judicial relief to which it was otherwise entitled.

On May 26, 1965, the Circuit Court of Cook County, Illinois entered a final order striking Appellant's Amended Complaint and dismissing Appellant's said action with prejudice. (Appendix D, *infra*, p. 12a). Appellant then appealed to the Supreme Court of Illinois, and on May 23, 1966, that Court filed an opinion affirming the judgment of the Circuit Court of Cook County (Appendix B, *infra*, p. 2a). A Petition For Rehearing was filed in the Supreme Court of Illinois on June 4, 1966 (R. 19), and on September 21, 1966, the Supreme Court of Illinois overruled said Petition and denied a rehearing in the case (Appendix A, *infra*, p. 1a; R. 20). Appellant filed its Notice of Appeal to the Supreme Court of the United States in the Supreme Court of Illinois on December 19, 1966 (R. 22).

The statutory provisions which confer on the Supreme Court of the United States jurisdiction to review the judgment of the Supreme Court of Illinois on appeal appear at Title 28, United States Code, Section 1257(2) and Section 2101. Cases which sustain that jurisdiction include *American Oil Co.* v. *Neill*, 380 U.S. 451; *Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U.S. 685; *Central Railroad Co. of Pennsylvania* v. *Pennsylvania*, 370 U.S. 607; *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77.

STATUTES INVOLVED

Relative to the Substantive Due Process—Commerce Clause—Jurisdiction to Tax Question.

Use Tax Act [Ill. Rev. Stat. 1963, c. 120, §§ 439.1-439.22].

"§ 3 [Ill. Rev. Stat. 1963, c. 120, § 439.3]

"A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Such tax is at the rate of * * * % of the selling price of such property * * *."

* * *

"§ 2 [Ill. Rev. Stat. 1963, c. 120, § 439.2]

"'Use' means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property * * *.

"'Purchase at retail' means the acquisition of the ownership of or title to tangible personal property through a sale at retail.

"'Purchaser' means anyone who, through a sale at retail, acquires the ownership of tangible personal property for a valuable consideration.

"'Sale at retail' means any transfer of the ownership of or title to tangible personal property to a purchaser, for use and not for resale in any form as tangible personal property, for a valuable consideration. * * *

* * *"

Relative to the Procedural Due Process Penalty Question.

Use Tax Act [Ill. Rev. Stat. 1963, c. 120, §§ 439.1-439.22].

"§ 12 [Ill. Rev. Stat. 1963, c. 120, § 439.12]

"All of the provisions of Sections * * * 5 * * * of the Retailers' Occupation Tax Act in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as

practicable, to the subject matter of this Act to the same extent as if such provisions were included herein."

Service Use Tax Act [Ill. Rev. Stat. 1963, c. 120, §§ 439.31-439.51].

"§ 12 [Ill. Rev. Stat. 1963, c. 120, § 439.42]

• • •

"All of the provisions of Sections • • • 5 • • • of the Retailers' Occupation Tax Act in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein."

Retailers' Occupation Tax Act [Ill. Rev. Stat. 1963, c. 120, §§ 440-453].

"§ 5 [Ill. Rev. Stat. 1963, c. 120, § 444]

"In case any person engaged in the business of selling tangible personal property at retail shall fail to file a return when and as herein required, but shall thereafter • • • file a return and pay the tax, he shall also pay a penalty of 10% of the amount of the tax.

• • •

"In case any person engaged in the business of selling tangible personal property at retail shall fail to file a return, the Department shall determine the amount of tax due from him according to its best judgment and information • • •. The Department shall notify such person or his legal representative • • • of the amount of tax so computed, stating that it proposes to assess such amount together with a penalty of 25% thereof. • • •

• • • "

(c)

QUESTIONS PRESENTED BY THE APPEAL.

I.

The Substantive Due Process—Commerce Clause—Jurisdiction to Tax Question.

Whether the State of Illinois may, without violating the

stitation of the United States, and without exceeding the limited taxing jurisdiction it has by reason of being but a single State in our federal system, assess and collect its Use Tax from a foreign corporation based upon amounts paid outside of Illinois by said foreign corporation to out-of-Illinois manufacturers for (A) manufacturing outside of Illinois certain "POS" advertising items, and (B) placing said "POS" advertising items on board carriers outside of Illinois and causing them to be sent into the State of Illinois consigned to and at the risk of independent third parties doing business in Illinois who are designated by the foreign corporation, where such consignee-independent third parties are not subject to any control by the foreign corporation as to the use or non-use they might make of the "POS" advertising items within the State of Illinois, notwithstanding that:

(1) Said foreign corporation did not use or otherwise exercise any incident of ownership over said POS advertising items within the State of Illinois;

(2) No act or conduct by the foreign corporation with reference to the POS advertising items, the use of which is sought to be taxed, occurred within the State of Illinois;

(3) No act or conduct of said foreign corporation with reference to said POS advertising items looked to Illinois either for a protective environment within the act or conduct could occur, for the determination of the legal consequences of any such act or conduct, and the law of Illinois did not invest any such acts or conduct with jural consequences;

(4) Only states other than Illinois provided that protective environment, determined those legal consequences, and invested the acts and conduct of the foreign corporation with reference to the POS advertising items with juristic effect;

(5) The State of Illinois did not provide the foreign corporation with a *quid pro quo* either with respect to the rights, privileges and powers exercised by said foreign corporation with respect to said POS advertising items or otherwise related to the privilege or its exercise which Illinois did not grant to Appellant but does seek to tax; and

(6) The only uses of, or privileges exercised with respect to, said POS advertising items by said foreign corporation occurred in or during the course of interstate commerce.

II.

The Procedural Due Process Penalty Question.

Whether the State of Illinois may, without violating the Due Process Clause of the Constitution of the United States, assess a 25% penalty surcharge against a foreign corporation because it sought, from the Illinois State Courts, judicial injunctive relief where:

(1) No other remedies afforded by Illinois to the foreign corporation to determine the legality of the assessment were "plain, speedy and efficient", and

(2) Neither the Illinois Use Tax Act nor the Illinois Service Use Tax Act contained penalty provisions except through an incorporation by reference of "not inconsistent" provisions of a separate taxing statute which purported only to penalize persons "engaged in the business of selling tangible personal property at retail" where said foreign corporation did not sell tangible personal property at retail either in Illinois or elsewhere.

(d)

STATEMENT OF THE CASE

1. Facts Material to the Questions Presented (R. 3, pp. 32-42).

MILLER BREWING COMPANY ("Appellant") was organized under the laws of the State of Wisconsin in 1936, is engaged in interstate commerce among the several states, and is authorized to do business within the State of Illinois. Appellant sells malt beverage products from its Milwaukee, Wisconsin, brewery directly to independent wholesale distributors throughout the several states who in turn sell and distribute said products to retailers who sell them to the ultimate consumers. Appellant does not sell any products at retail to ultimate consumers.

As part of its general advertising program, Appellant directed from Wisconsin that certain "Point of Sale" advertising material ("POS advertising items"), such as interior signs, clocks, napkins, coasters and similar devices, be manufactured by sundry businesses (the "fabricators"), some of which were located within Illinois but the bulk of which were located outside of Illinois. This appeal is limited to the question of Illinois Use Tax liability for the POS advertising items which Appellant ordered out-of-Illinois fabricators to produce and Appellant is not appealing the Illinois Supreme Court's decision that it is liable for Use Tax upon items produced for it by the Illinois fabricators.

Pursuant to directions from Appellant, the said fabricators manufactured POS advertising items, retained physical possession of them until they received "drop shipping orders" from Appellant, and then shipped said POS advertising items to the independent wholesale distributors designated by Appellant. In accordance with Appellant's instructions, the out-of-Illinois fabricators delivered POS

advertising items, for which Appellant paid $509,471.20, to independent carriers, shipping charges prepaid, for delivery to designated Illinois wholesale distributors. As soon as those items were delivered to the respective carriers outside of Illinois, Appellant's control over them terminated and it became obligated to pay the fabricators for the cost of fabrication of those items. The fabricators were named as consignors of all shipments, the several Illinois wholesale distributors were named as consignees, and Appellant's only relationship to the entire transaction was to pay for the cost of production, to designate the several consignees, and to pay the cost of shipment. Risk of loss during shipment was in the consignees who were to make any claims for damages in transit. Amounts paid by Appellant for the fabrication and shipment of such items were charged as advertising expenses by Appellant and none of said items had ever been inventoried by Appellant or entered upon its books of account as assets. Appellant never had an intent to acquire ownership of any of the POS advertising items.

Appellant did not control, either directly or indirectly (by the payment of bonuses or assessment of charges for the use or non-use of the POS advertising items), the use or non-use made of the items in Illinois by the Illinois wholesale distributors of its products. The decision as to whether the items would be used or not used within the State of Illinois, and the methods of use, were within the complete discretion of the independent wholesale distributors.

2. The Assessments (R. 3, pp. 41-42, 44-45).

The Illinois Director of Revenue determined that Appellant had paid for the POS advertising items which had been shipped to Illinois distributors from other states; he then determined that Appellant was liable for Illinois Use

Taxes measured by the amounts paid to the foreign suppliers. When Appellant advised Appellee that it denied legal liability for the Use Taxes demanded, Appellee threatened to add a 25% penalty to the amount of the Illinois Use Taxes if Appellant did not pay the amount demanded; and subsequently said Director of Revenue did in fact add that penalty to the assessments at issue in this case.

The Illinois Director of Revenue also added 25% penalties to certain Service Use Taxes, and although Appellant is not appealing the adequately non-federal decision of the Illinois Supreme Court that it was liable for said Service Use Taxes, it is appealing the decision that it was properly held liable for the 25% penalties thereon.

3. The United States District Court Action.

Appellant, in determining what remedy to pursue, was confronted with a dilemma. The Illinois statutory remedies available to aggrieved taxpayers by way of protest, hearing, and court review, the only remedies available to Appellant if it were to avoid the 25% penalties, were not (R. 3, pp. 34-36), and had already been held not to be, "plain, speedy and efficient." *United States, et al.* v. *Department of Revenue of the State of Illinois, et al.*, 191 F. Supp. 723 (N.D. Ill. E.D. 1961); further, the Illinois Administrative Review Act (Ill. Rev. Stat., c. 110, Sec. 265 (1963)) purported to make those remedies the only remedies available to Appellant. Appellant therefore filed suit in the United States District Court for the Northern District of Illinois seeking a permanent injunction against the Illinois Director of Revenue, but on November 10, 1964, that action was dismissed without prejudice because that Court found that notwithstanding the Illinois Administrative Review Act there was "no valid reason to deny the existence of a State Court injunction as a potential remedy in this case." (Appendix E, *infra*, p. 14a).

4. The Decisions of the Illinois Courts.

Appellant then filed this action in the Circuit Court of Cook County, Illinois, against the Illinois Director of Revenue seeking injunctive and other judicial equitable relief from assessments of the Illinois Use and Service Use Taxes and penalties thereon. Appellant alleged in its Amended Complaint (R. 3, pp. 45-57) that the assessment and collection of Illinois Use Taxes would deprive Appellant of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States, would constitute a discriminatory and unlawful interference with Appellant's interstate commerce, and would constitute an extension of the scope and operation of the Illinois Use Tax extraterritorially to privileges exercised by Appellant outside the State of Illinois within other States and in the ordinary course of Appellant's interstate commerce activity. Appellant also pointed out in detail in its Amended Complaint the reasons why Appellant's remedies, other than the equitable relief it sought, were legally inadequate (R. 3, pp. 34-36) and alleged that the assessment of the 25% penalties against Appellant would constitute a prior restraint upon Appellant's legal right reasonably to challenge the assessments and hence would deny Appellant its federally guaranteed right to due process of law (R. 3, pp. 45-46).

Upon motion of the Director of Revenue, the Circuit Court of Cook County dismissed the Amended Complaint, specifically finding that the matters set forth therein were substantially insufficient in law and equity to support Appellant's action against the Illinois Director of Revenue; and that court dismissed with prejudice Appellant's said action (Appendix D, *infra*, p. 12a).

Appellant appealed to the Supreme Court of Illinois and in due course filed a Brief (R. 5) and a Reply Brief (R. 9)

both of which amplified in detail the allegations of the Amended Complaint that assessments of the Illinois Use Taxes against Appellant would violate the due process and commerce clauses of the Constitution of the United States (R. 5, pp. 9, 10-13, 22-41; R. 9, pp. 2-3, 5-23); and those Briefs also detailed the reasons why assessments of the 25% penalties would violate Appellant's rights to due process of law under the Fourteenth Amendment as alleged in the Amended Complaint (R. 5, pp. 14, 47-54; R. 9, pp. 3-4, 26-37). The Illinois Supreme Court affirmed (Appendix C, *infra*, p. 10a) the decision of the lower court.

The opinion of the Illinois Supreme Court (Appendix B, *infra*, p. 2a) is not susceptible of easy interpretation, and was responsive only to the non-federal statutory construction aspects of the problem presented. The Court found that Appellant became "constructive owner" of the POS advertising items when it exercised in other states its powers to designate the Illinois recipients, that said "constructive ownership" continued when the items entered into Illinois (presumably because the Amended Complaint failed to meet Illinois rules of pleading concerning nonconclusionary allegations of passage of title and ownership), and thereupon the items were "constructively used" in Illinois by Appellant.

It is regrettable that the Illinois Supreme Court did not go beyond problems of statutory construction and at least make an effort to square its opinion with the broad spectrum of due process and commerce clause cases extensively cited, argued, and relied upon by Appellant. Perhaps this case is distinguishable in a relevant constitutional way, for example, from *American Oil Co.* v. *Neill*, 380 U.S. 451; but if it is (and notwithstanding much study and reflection Appellant has been unable to rationalize any relevant difference), the Illinois Supreme Court should teach all of us the distinction.

Even if it were the intent that the Illinois Supreme Court's decision should operate on the level of the constitutional as well as the interpretive, the semantics of "constructive ownership" and "constructive use" used in an apparent attempt to find some slight Illinois incident to support the tax should not be allowed to darken the guarantees provided by the Constitution of the United States. Perhaps the most fundamental rule of State taxation is that neither State Courts nor State Legislatures, by giving a specific tax a particular name or by the use of some form of words, can remove the duty of the Supreme Court of the United States to consider the nature and effect of a particular tax, an inquiry which will be concerned only with the practical operation of it. *Galveston, Harrisburg and San Antonio Railway Company* v. *State of Texas*, 210 U.S. 217; *St. Louis Cotton Compress Company* v. *State of Arkansas*, 260 U.S. 346; *Carpenter* v. *Shaw*, 280 U.S. 363; *Storaasli* v. *State of Minnesota*, 283 U.S. 57; *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U.S. 435; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69; *Railway Express Agency, Inc.* v. *Virginia*, 347 U.S. 359 (1954). It is also regrettable that the Illinois Supreme Court chose to couple that argument with one concerning the failure of the Amended Complaint to comply with Illinois rules concerning sufficient pleadings of non-ownership, etc., for it is equally well-settled that whether a pleading sets up a sufficient cause of action grounded on the United States Constitution is a question of federal law upon which the Supreme Court of the United States must determine for itself the sufficiency of the allegations displaying the right. *Carter* v. *Texas*, 177 U.S. 442; *First National Bank of Guthrie Center* v. *Anderson*, 269 U.S. 341; *Staub* v. *City of Baxley*, 355 U.S. 313; *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522.

(e)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This appeal presents the question whether Illinois may constitutionally impose a Use Tax upon an out-of-State exercise by Appellant of a power of disposition of tangible personal property where Illinois' only relationship to the transaction is that Appellant is authorized to do business within the State of Illinois. It is Appellant's opinion that the Supreme Court of Illinois clearly and fundamentally erred in holding that the Use Tax assessed against it is constitutional; and that taxpayers everywhere have just grievances against that decision being allowed to enter the mainstream of the law of state taxation.

(1) Under the Due Process Clause of the Fourteenth Amendment a State has no power to tax transactions which occur outside of its borders. *American Oil Co.* v. *Neil*, 380 U.S. 451, 458, 459; *Treichler, Executor* v. *Wisconsin*, 338 U.S. 251, 256-257; *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77, 81-82; *Union Refrigerator Transit Company* v. *Kentucky*, 199 U.S. 194, 204.

(2) The Due Process Clause of the Constitution of the United States precludes a State from assessing a tax against a foreign corporation unless it provides the taxpayer with a *quid pro quo* related to the taxed property or privilege. *Standard Oil Company* v. *Peck*, 342 U.S. 382, 384-385; *Treichler, Executor* v. *Wisconsin*, 338 U.S. 251, 256-257; *Union Refrigerator Transit Company* v. *Kentucky*, 199 U.S. 194, 202. In this case, each and every phase of the transaction had its locus outside of Illinois. Appellant's power to designate the recipients of the POS advertising items, exercised exclusively outside the State of Illinois, was not dependent upon a privilege or authority granted by Illinois, and Illinois law afforded to Appellant no protection in its exercise of that power of disposition. Since Illinois did not, therefore, provide Appellant with

a *quid pro quo* for the tax it seeks to extract, assessment of it clearly violates the Due Process Clause of the Constitution of the United States. *American Oil Co.* v. *Neill*, 380 U.S. 451; *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77, 81-82; *Farmers' Loan and Trust Company* v. *Minnesota*, 280 U.S. 204, 214-215, 217.

(3) The Illinois Supreme Court's opinion seems to seek moral justification for its result in the idea that when all is said and done it is only fair for Appellant to pay the Use Taxes because it benefits when the people of the State of Illinois purchase the malt beverage products (and pay Illinois taxes when they do so) produced by Appellant. But it has been conclusively and well established that a State has no power to tax a foreign corporation, not otherwise properly subject to a particular state tax, merely because the foreign corporation benefits financially from property or events or a market established within the taxing state. *Connecticut General Life Insurance Company* v. *Johnson*, 303 U.S. 77, 80-81; *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 454-455; *Farmers' Loan and Trust Company* v. *Minnesota*, 280 U.S. 204, 209; *Rhode Island Hospital Trust Company* v. *Doughton*, 270 U.S. 69.

(4) The Commerce Clause of the Constitution of the United States also precludes the assessment by Illinois of its Use Tax against Appellant since all privileges and powers exercised by it in relation to the POS advertising items took place in States other than Illinois and in the course of interstate commerce. *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344; *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 167-168; *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, 393; *Joseph* v. *Carter and Weekes Co.*, 330 U.S. 422, 433.

The procedural due process question concerning the 25% penalties is also substantial in that the assessment of those

penalties, which would not have been imposed against Appellant if it had paid the taxes demanded of it (R. 3, pp. 41-42, 44-45), constitute a charge for seeking judicial relief against assessment of the taxes because the only alternative Illinois remedies of protest, hearing and court review were not "plain, speedy and efficient." *United States* v. *Department of Revenue of the State of Illinois,* 191 F. Supp. 723, 727 (N.D.Ill. E.D. 1961). Penalties which serve to discourage resort to the Courts for determination of the validity or invalidity of an application of a legislative enactment are violative of the Due Process Clause of the United States Constitution, Ex Parte *Young,* 209 U.S. 123, even if the litigant ultimately does not prevail upon the substantive merits of its case, *Oklahoma Operating Company* v. *Love,* 252 U.S. 331.

This case represents far, far more than an isolated instance of the promulgation of injustice by a state court, the decisions of the Supreme Court of the United States to the contrary notwithstanding. The Use Tax is in many respects the tax of the future and its application, as this case indicates, long ago outran the original purpose of dissuading residents of the taxing state from evading the sales tax by purchasing goods in other places. The question presented by this case is of general importance to all states and to all taxpayers: Are use taxes to be limited by constitutional standards of "local incidents," "nexus," and *"quid pro quo,"* or may a state assess such taxes with impunity by finding in-state uses through the application of "attenuated subtleties."

CONCLUSION

After the start of this litigation, this Court decided the case of *American Oil Co.* v. *Neill*, 380 U.S. 451. The decision in that case should have concluded this case in favor of Appellant, but the Illinois State Courts refused to acknowledge the existence of that case much less be bound by it. Appellant respectfully suggests that perhaps the integrity of our State-Federal judicial system fairly requires a summary reversal of the decision of the Supreme Court of Illinois on the basis of the *American Oil Co.* case. This procedure has been followed in exceptional cases. *United States* v. *Haley*, 358 U.S. 644.

In any event, the questions presented by this Appeal are substantial and of general and public importance. Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA

STATE OF ILLINOIS
SUPREME COURT } ss.

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth *day of* September *in the year of our Lord, one thousand nine hundred and* sixty-six, *within and for the State of Illinois.*

* * *

BE IT REMEMBERED, that, to-wit: on the 21st day of September, A.D. 1966, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Miller Brewing Company, a Wisconsin corporation,
Appellant
No. 39529 vs.
Marshall Korshak as Director of Revenue,
Appellee
} Appeal from Circuit Court Cook County

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

APPENDIX B

Docket No. 39529—Agenda 48—January, 1966.

Miller Brewing Company, Appellant, v. Marshall Korshak, Director of Revenue, Appellee.

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

The plaintiff, Miller Brewing Company, a Wisconsin corporation licensed to do business in Illinois, brought this action against the Director of Revenue to enjoin him from taking any steps to assess against and collect from the plaintiff any use tax or service use tax, or penalties, with respect to certain items of tangible personal property for the period from January 1, 1961, to May 31, 1964, on the ground that such taxes would be illegal and unconstitutional. The defendant's motion to dismiss plaintiff's amended complaint was granted and plaintiff appeals. The revenue and constitutional questions are involved.

We shall consider first the allegations of the amended complaint that relate to the notice of proposed use tax assessment that was served upon the plaintiff. The plaintiff manufactures "malt beverage products" in Wisconsin and sells them directly to "independent wholesale distributors" who, in turn, sell to retailers. It does not sell any of its products directly either to retailers or to consumers. "In the ordinary course of its business plaintiff has found it advisable to promote a demand for its malt beverage products among ultimate consumers by providing for the manufacture and fabrication of certain 'point-of-sale' advertising material (hereinafter referred to as 'POS' advertising items') such as interior neon signs, clocks and other devices intended to encourage a demand for the products of Plaintiff among those who congregate at the point of ultimate sale of Plaintiff's products." The fabricators retained the

items until Miller sent them a "requisition drop shipping order" directing them where to ship the items. In the period relevant here, Miller paid a total of $592,879.19 for items shipped to Illinois wholesalers. Of this total, $83,407.99 was paid to Illinois fabricators; the bulk of the remainder was paid to fabricators located in Minnesota and Wisconsin.

The amended complaint alleged that "Plaintiff did not intend to acquire title to or property in any of said POS advertising items" except those shipped to its Wisconsin warehouse. It continued:

> "14.2. Except for the Wisconsin warehouse items, none of said POS advertising items shipped to the Illinois wholesale distributors had ever been inventoried by the Plaintiff or entered upon the books of account of the Plaintiff.
>
> "14.3. Except for the aforementioned Wisconsin warehouse items, Plaintiff was not named, either as consignor or otherwise, upon any of the bills of lading or other shipping documents which accompanied the respective shipments.
>
> "14.4. The fabricators and suppliers delivered the POS advertising items to independent carriers, shipping charges prepaid, for delivery to the Illinois Wholesale distributors.
>
> "14.5. As soon as the fabricators and the suppliers delivered the said POS advertising items to the respective carriers, Plaintiff became legally obligated to pay said fabricators and suppliers for the cost of fabrication of said POS advertising items and to reimburse them for freight charges which had been prepaid by them.
>
> "14.6. The respective suppliers were named as consignors of all shipments and the several Illinois wholesale distributors were named as consignees. Risk of loss during shipment was in the consignees and all claims for damage were to be made by the consignees.

"14.7. Title to the POS advertising items passed from the suppliers to the Illinois wholesale distributors when said items were delivered to the respective carriers at the points of origin of the shipments.

"14.8. If, contrary to its intent, the Plaintiff at any time acquired any ownership, title or interest in and to any of said POS advertising items other than the Wisconsin warehouse items, any such ownership, title or interest was relinquished by Plaintiff no later than the time when said POS advertising items were placed with carriers at the respective points of origin of the respective shipments."

The complaint further alleged that prices to the wholesalers "were not increased to cover the cost to Plaintiff of the POS advertising items;" that "Plaintiff did not direct or control any such distributors in the use or distribution of said items nor did Plaintiff pay any bonuses or any charges for the use or non-use of such items," but the wholesalers "usually distributed the POS advertising items to various Illinois retailers who would then use said items at the point-of-sale to encourage a demand for Plaintiff's malt beverage products among ultimate consumers thereof."

As we read the complaint, what the plaintiff says is that it caused the items of tangible personal property here involved to be manufactured in order to promote the sale of its product. It paid for them, directed their shipment to particular wholesalers in Illinois, and paid the freight charges. But it also says that it never became the owner of these items because it did not ever intend to take title to them, and did not inventory them or enter them upon its books of account. We think those considerations are irrelevant. The plaintiff caused the items to be brought into being, paid for their manufacture and exercised complete power of disposition over them. Even if, in some other context or for some other purpose, someone other than the plaintiff

might somehow be regarded as the owner of the items in the state in which they were manufactured, the dominion exercised over them by the plaintiff is sufficient to establish the plaintiff as their owner for the realistic purposes of a taxing statute.

The only conclusion that we can reach from the allegations of the complaint is that the plaintiff was the owner of the items in question when it directed that they be shipped into Illinois in order to stimulate the sale of its product. They were used in this state for that purpose. The complaint does not allege that these items of personal property fall within any of the statutory exceptions dealing with property brought into this state by an owner. (See Ill. Rev. Stat. 1963, chap. 120, par. 439.3.) Unless, therefore, the ownership of these items was transferred to someone else, the property was used in Illinois by the plaintiff, and the plaintiff is subject to the use tax. We turn, therefore, to the allegations of the complaint that are apparently intended to divorce the plaintiff from ownership of this property.

Paragraph 14.7 of the complaint alleges: "Title to the POS advertising items passed from the suppliers to the Illinois wholesale distributors when said items were delivered to the respective carriers at the points of origin of the shipments." This paragraph is based upon the assumption that the plaintiff never acquired any interest in or title to the items, a theory that we are unable to accept. Moreover, the allegation as to the passage of title is unmistakably a conclusion of law rather than an allegation of fact. (*Leitch* v. *Hine*, 393 Ill. 211; *Wolcott* v. *Village of Lombard*, 387 Ill. 621, 626; *Grove* v. *Templin*, 320 Ill. 597, 602). Yet the facts as to the transactions are peculiarly within the knowledge of the plaintiff.

Paragraph 14.8 of the complaint alleges that if the plaintiff at any time acquired any ownership, title or interest in and to any of the items, and we have held that it did, "any such ownership, title or interest was relinquished by the plaintiff * * *." Here, again, the complaint studiously fails to allege facts.

In the context of this statute, we are unaware of the meaning of an allegation that title, interest or possession has been "relinquished." The complaint nowhere alleges that the items were sold to the Illinois wholesale distributors or to anyone else. The allegation that the plaintiff did not increase prices to its wholesalers to cover these items seems designed to negative a sale, and in the trial court the plaintiff did not argue that a sale had taken place. Similarly, there is no allegation that the items were given by the plaintiff to the Illinois wholesalers or to anyone else. The original complaint alleged that these items "are furnished gratuitously to the several independent distributors of Plaintiff." During the argument before the trial court the plaintiff refused to concede that there had been a gift, and in its amended complaint, filed after that argument, the allegation that the items were "furnished gratuitously" was omitted.

The complaint has been carefully drafted to avoid a plain and a simple statement of the actual transactions between the plaintiff and the wholesale distributors. Whether this was done in order to avoid taking a position that might result in the imposition of a tax upon its wholesale or retail distributors, we do not know. Like the circuit court, we must determine the legal sufficiency of the amended complaint that the plaintiff has chosen to file, and in our opinion the circuit court properly held that it failed to establish the illegality of the use tax proposed to be assessed against the plaintiff.

In its briefs in this court the plaintiff has argued extensively numerous questions under the due process and commerce clauses of the Federal constitution. But the amended complaint that it filed does not assert facts that would call into operation the constitutional doctrines that it advances.

With respect to the proposed assessment under the service use tax, the amended complaint alleged that "Plaintiff has determined that the demand for its products will be increased if the various retailers of said products display, outside of their several places of business, signs which disclose that the individual retailer is engaged in the sale of Plaintiff's products." The signs were shipped to plaintiff's wholesale distributors and were installed at "the several places of business of those Illinois retailers who sell the malt beverages produced by Plaintiff to ultimate consumers thereof."

The amended complaint continued: "Plaintiff did not lease said signs either to the wholesalers or retailers who used them, and Plaintiff did not receive rent or other payments either from the distributors or from the retailers for the use of said signs. While it is possible that, with respect to an insignificantly small number of such signs, Plaintiff might have exercised a right or power over such signs during the period involved, as a general proposition Plaintiff merely retained ownership of said signs while they were located within the State of Illinois and did not exercise any rights or powers over such signs incident to that ownership during the period involved."

Plaintiff contends that the signs which it concededly owns in Illinois are not subject to the Service Use Tax Act. That act imposes a tax on "the privilege of using in this State real or tangible personal property acquired as an inci-

dent to the purchase of a service from a serviceman." Apparently the individualized character of these signs accounted for their assessment under the service use tax. In any event, the plaintiff does not contend that it did not purchase service from a serviceman. Its contention is rather that it does not, in the language of the act, exercise "any right or power over tangible personal property incident to the ownership of that property." To tax its signs under the Service Use Tax Act would, plaintiff contends, equate "the Service Use Tax with a property tax, assessable merely because of ownership."

The fact remains, however, that the plaintiff used these signs in Illinois, for its benefit, in the natural way in which signs are used, by causing them to be put up where people could look at them. The power to allow property one owns to be used for one's benefit in this manner is the "exercise" of "an incident of ownership" under the act. The contention that the tax is a "double tax" is clearly without merit.

Finally, it is the plaintiff's position that regardless of its liability for the principal amounts of the taxes assessed against it, the 25% penalties imposed for failure to file returns should not be sustained. It argues first that the penalties are not authorized by the taxing statutes, and second, that if the statutes authorize the penalties, they are invalid under the due-process clauses of the State and Federal constitutions. Section 12 of the Use Tax Act, and section 12 of the Service Use Tax Act, each provide that certain designated sections of the Retailers' Occupation Tax Act "which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein." (Ill. Rev. Stat. 1963, chap. 120, pars. 439.12; 439.42.) Section 5 is one of the sections of the Retailers' Occupation Tax Act thus incorporated by reference. One of the main purposes of that

section is to provide for penalties in certain cases, including a 25% penalty for failure to file a return, (Ill. Rev. Stat. 163, chap. 120, par. 444.) and we think it is clear that this penalty provision is applicable to the use tax and the service use tax. *Cf. Turner* v. *Wright*, 11 Ill.2d 161.

In our opinion the penalty provisions do not deprive the plaintiff of its constitutional rights. As is true of many other taxes, the information from which the amount of these taxes must be computed is peculiarly within the knowledge of the taxpayer. In *Helvering* v. *Mitchell*, 303 U.S. 391, 82 L. Ed. 917, the validity of sanctions designed to ensure full and honest disclosure was sustained, and their civil rather than criminal character was recognized. The imposition of a 25% penalty for failure to file a return has been approved in many cases. (*Offutt* v. *Commissioner*, (4th cir. 1960) 276 F.2d 471; *Henningsen* v. *Commissioner*, (4th cir. 1957) 243 F.2d 954; *McAlpine Land & Development Co.* v. *Commissioner*, (4th cir. 1942) 126 F.2d 163; *Noteman* v. *Welch*, (1st cir. 1939) 108 F.2d 206.) Other than its asserted belief that it was not liable to pay the taxes, the plaintiff has shown no reason to justify its failure to file a return; similar assertions have been held ineffective to avoid a penalty for failure to file a return. See, *e.g. Heman* v. *Commissioner*, (8th cir. 1960) 283 F.2d 227, 233.

For the reasons stated, the judgment of the circuit court is affirmed.

Judgment affirmed.

APPENDIX C

UNITED STATES OF AMERICA

STATE OF ILLINOIS } ss.
SUPREME COURT }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth *day of* May *in the year of our Lord, one thousand nine hundred and* sixty-six, *within and for the State of Illinois.*

* * *

Be It Remembered, that, to-wit: on the 23rd *day of* May *1966, the same being one of the days of the term of Court aforesaid the following proceedings were, by said court, had and entered of record, to-wit:*

Miller Brewing Company, a Wisconsin corporation,
Appellant
vs.
Marshall Korshak as Director of Revenue,
Appellee

No. 39529

Appeal from Circuit Court Cook County 64 CH 6489

Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the

record and proceedings aforesaid, nor in the rendition of the judgment *aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.*

THEREFORE, *it is considered by the Court that the* judgment of the Circuit Court of Cook County *aforesaid,* BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, *notwithstanding the* said matter and things therein assigned for error. xxxxxxxxx

I, MRS. EARLE BENJAMIN SEARCY, *Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.*

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 27th *day of* September, *1966.*

/s/ Mrs. Earle Benjamin Searcy,

Clerk, Supreme Court of the State of Illinois

APPENDIX D

STATE OF ILLINOIS } ss
COUNTY OF COOK }

IN THE

CIRCUIT COURT OF COOK COUNTY

MILLER BREWING COMPANY,
a Wisconsin corporation,
Plaintiff,

vs.

MARSHALL KORSHAK,
as Director of Revenue,
Defendant.

IN CHANCERY
No. 64 CH 6489

ORDER STRIKING AMENDED COMPLAINT
AND
DISMISSAL OF ACTION

THIS MATTER COMING ON TO BE HEARD on the Motion of Defendant, MARSHALL KORSHAK, as Director of Revenue, by WILLIAM G. CLARK, Attorney General of the State of Illinois, his Attorney, to have Defendant's motion to strike and dismiss Plaintiff's original complaint heretofore filed, stand as Defendant's motion to strike and dismiss Plaintiff's amended complaint; the Court having jurisdiction over the parties and the subject matter; counsel for both parties present and after a full and complete hearing; and

The Court finding that the Amended Complaint of MILLER BREWING COMPANY and the matters therein

contained are substantially insufficient in law and equity to support Plaintiff's action against the Defendant;

It is HEREBY ORDERED, ADJUDGED, and DECREED that:

1. Defendant's Motion to Strike the Amended Complaint of Plaintiff, MILLER BREWING COMPANY, is granted; and

2. Plaintiff, MILLER BREWING COMPANY, shall take nothing by its action which shall be, and is hereby, dismissed with prejudice.

3. Plaintiff take nothing and that Defendant go hence without day.

ENTER: /s/ WILLIAM V. BROTHERS
Judge

Judge Wm. V. Brothers
May 26, 1965
Circuit Court

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MILLER BREWING COMPANY, a Wisconsin corporation,
Plaintiff,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, and HARRY L. HULMAN, Director of Revenue,
Defendants.

No. 64 C 1222.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the HONORABLE EDWIN A. ROBSON, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, November 10, 1964, at 10:00 o'clock a.m.

(The Court gave attention to other matters on the call, after which the following proceedings were had herein, to-wit:)

THE CLERK: 64 C 1222, Miller Brewing Company, against Department of Revenue of the State of Illinois, for ruling on defendants' motion to dismiss and plaintiff's motion for preliminary injunction.

THE COURT: Good morning.

The Miller Brewing Company, a Wisconsin corporation, moves this Court to issue a preliminary injunction against

the levying and collecting of certain taxes under the Illinois Use Tax, Illinois Revised Statutes, Chapter 120, Section 439.1, et seq. (1963) and Illinois Service Use Tax, Illinois Revised Statutes, Chapter 120, Section 439.31, et seq. (1933).

The plaintiff company contends that jurisdiction exists in this court by virtue of Title 28 U.S.C. Section 1331, 1332 and 1341. A motion to dismiss has been filed by the Illinois Attorney General, on behalf of the defendants, alleging that a Federal Court cannot assume jurisdiction to restrain State tax assessments when a speedy and efficient remedy is available in the Illinois State Courts. The Court finds merit in the defendants' position.

The Miller Brewing Company employs independent wholesale distributors who sell and distribute malt beverage products to Illinois retail outlets. To promote sales at these outlets, the Miller Company has expended large sums of money on "point-of-sale" advertising materials such as exterior signs, clocks, et cetera. These items are sent from the fabricators and suppliers directly to the independent distributors who thereafter redistribute said advertising material to Illinois beverage retailers.

The plaintiff becomes liable for the cost of these materials upon shipment by the fabricator and suppliers to the independent distributors. On June 4, 1964, agents of the Illinois Department of Revenue audited plaintiff's books and determined that between July 1, 1961 and May 31, 1964, the brewery became liable for Illinois Use and Service Use Taxes. This conclusion was predicated upon a finding by the auditors that Miller Company exercised rights and powers over the advertising material sent into the State of Illinois.

The plaintiff denied that any benefits were derived which created a taxable incident favorable to the state, and further maintains that assessing any taxes on these items constitutes an unlawful expansion of the tax statutes to non-residents. However, the total taxes levied to date are $17,896.93 and when the plaintiff refused payment, a 25 per cent penalty was added, bringing the over-all amount to $22,371.17.

Miller Brewing Company asserts that jurisdiction in this Court is predicated upon the Johnson Act, Title 28 U.S.C. Section 1341. That Act provides the District Court with authority to enjoin the collection of state taxes when the taxpayer has no "plain, speedy and efficient remedy" to contest their assessment. The absence of any such remedy is asserted to be evidenced herein by two factors; the Use and Service Use Taxes do not provide for the payment of interest when taxes paid under protest are ultimately proved invalid, and when seeking to review any assessment, no provision allows payment of the bonding cost to a successful taxpayer-litigant.

However, the Johnson Act requires that a taxpayer must exhaust all available state procedures before requesting an injunction. Delaware, Lackawanna & Western Railroad Co. v. Kinglsey, et al., 189 Fed. Supp. 39 (D. N.J. 1960). There must, however, be more than a probability that such remedy does exist in the state court. Mountain States Power Company v. Public Service Commission of Montana, et al., 299 U.S. 167 (1936).

When contesting a tax assessment, the taxpayer can proceed by one of three statutory methods once the final assessment has been issued. These methods are: paying the tax under protest and filing a suit to enjoin transferring said funds from the protest fund, Illinois Revised Statutes,

Chapter 127, Paragraph 172(a), (1963), followed by filing a credit claim within 60 days; paying the tax under protest and filing a claim for credit, or; contesting the tax after the department issues proposes assessments by protest, and requesting hearings. Illinois Revised Statutes, Chapter 110, Paragraph 264 (1963).

However, an independent ground of equitable relief is available since the State court will enjoin the collection of any tax which is unauthorized by law or levied upon property exempt from taxation. Goodyear Rubber Company v. Tierney, 411 Ill. 421 (1952).

A revenue statute may be illegal either because the provisions therein are unconstitutional, Time Incorporated v. Harry L. Hulman, Director of Revenue, et al., Advertising Publications Inc. et. al. v. Same Appellees, Docket No. 38470 and 38582 (1964), or because the statute's provisions are improperly applied to the parties in question. Baumgardt d/b/a A & B Shop v. Isaccs, 29 Ill. 2d 29 (1963); Owens-Illinois Glass Company v. McKibbin, 385 Illinois 245 (1944). In both of the above situations, an injunction was available once the requisite showing of illegality had been made.

An examination of the plaintiff's pleadings indicates a misconception concerning the nature and availability of injunctive relief. In the complaint, Miller Brewing Company requests this Court to enjoin and declare Illinois Use and Service Use Taxes non-applicable to the plaintiff's transactions. However, a supporting brief filed thereafter states that no challenge is being made toward the illegality of the taxes, per se, although an obvious disagreement exists with the applied tax assessment in this case.

At this juncture a state injunction procedure must resolve the issue of tax application before the remedy ques-

tion, for example, the non-availability of interest and bonding costs, is ripe for this Court's consideration under Section 1341.

The plaintiff contends that United States v. Department of Revenue of State of Illinois, 191 Fed. Supp. 723 (N.D. Ill. 1961), vacated 368 U.S. 30 (1961), 202 Fed. Supp. 757 (N.D. Ill. 1962), affirmed 371 U.S. 21 (1962) is authority for this Court's assumption of jurisdiction under Section 1341.

However, that case is clearly distinguishable because:

> ". . . it is conceded by plaintiffs that Olin Mathieson is a retailer subject to the occupation tax of Illinois. Therefore, it may not invoke the remedy of injunctive relief in the Courts of Illinois."

The Olin Mathieson Company made the very concession that plaintiff herein regards as a primary issue and this Court considers a prerequisite to assuming jurisdiction. The Miller Brewing Company also cites United States, et al. v. Otis W. Livingston, et al., 179 Fed. Supp. 9 (E.D. S.C. 1959), another state revenue decision heard by the Federal Court. This case is not persuasive because South Carolina offered no alternative remedies other than suing for a refund after prepayment of the tax.

Furthermore, an independent jurisdictional ground existed since the state was attempting to tax sovereign property otherwise immune under the Constitution and laws of the United States.

The Miller Brewing Company seems to deny that any injunctive relief can be available, after the assessment, because of the prohibitions of the Administrative Review Act, Illinois Revised Statutes, Chapter 110, Section 265 (1963).

This Act proscribes review of any agency to which the act is applicable by stating that:

". . . any other statutory, equitable or common law mode of review of decisions or administrative agencies heretofore available shall not be employed after the effective date hereof."

Notwithstanding this mandate against judicial review, the authorities in Illinois find no constitutional authority in the state legislature whereby the state courts can be deprived of their inherent equitable power to issue injunctions. Peoples Gas, Light and Coke Company v. Slattery, et al., 373 Ill. 31 (1940); Chicago and North Western Railway Company v. Lyons, 148 Fed. Supp. 787 (S.D. Ill. 1957).

The Court therefore finds no valid reason to deny the existence of a state court injunction as a potential remedy in this case.

This Court orders the present temporary restraining order be vacated and denies the plaintiff's motion for a preliminary injunction.

The defendant's motion to dismiss will be granted but without prejudice, and that will be the order of the Court.

MR. TESCHNER: Do you wish a draft order?

THE COURT: Yes, a draft order, of course.

MR. TESCHNER: All right, thank you, your Honor.

(Which were all the proceedings had in the above-entitled cause on the day and date aforesaid.)

* * *

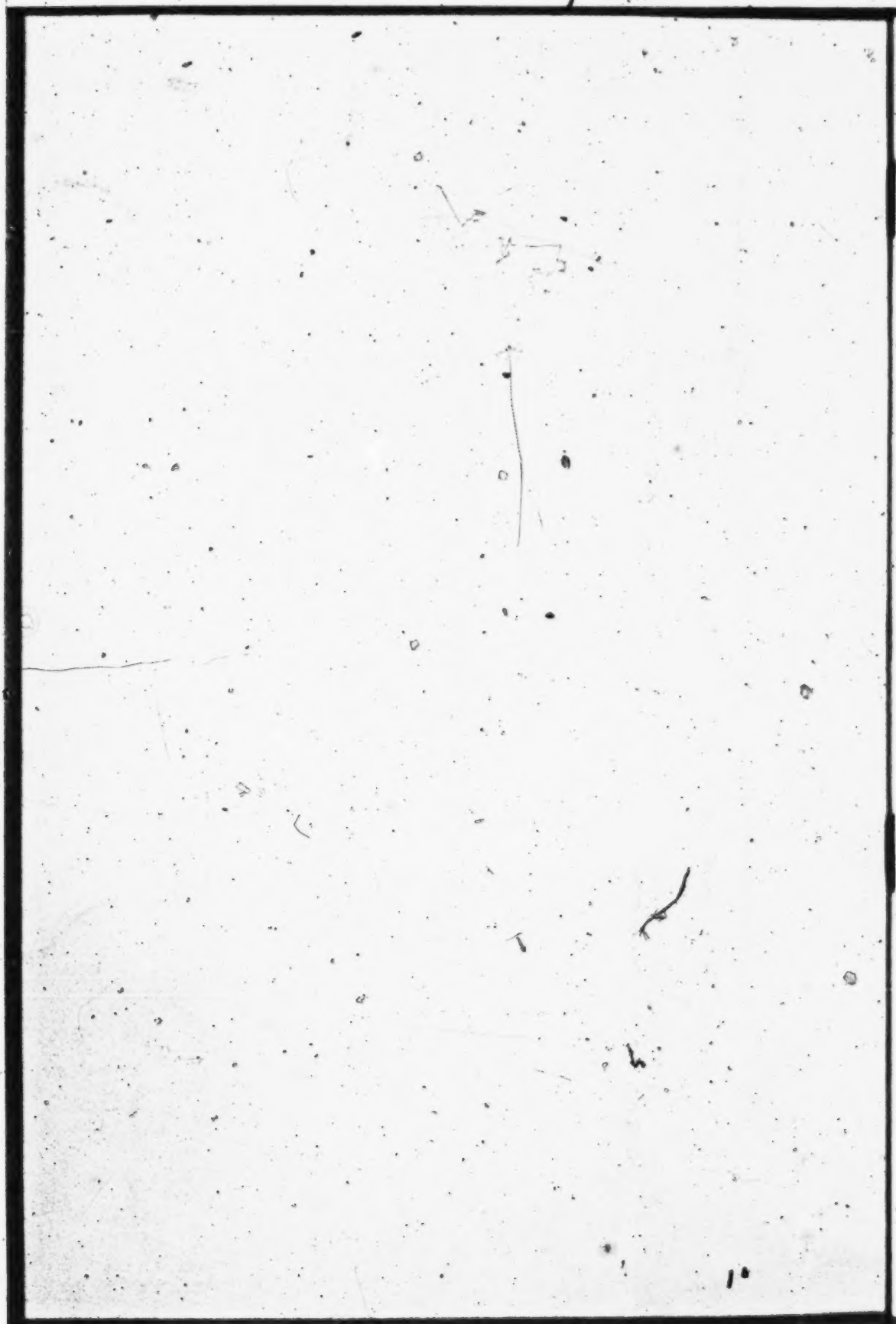
CERTIFICATE

I HEREBY CERTIFY that the proceedings had in the above-entitled cause before the HONORABLE EDWIN A. ROBSON, one of the Judges of said Court on Tuesday, November 10, 1964, was reported stenographically under

my direct personal supervision, and that the foregoing transcript consisting of pages 1 to 10, inclusive, is a true, correct and complete transcript of the official shorthand notes so made as aforesaid.

/s/ CLAUDE W. YOUKER, JR.

Claude W. Youker, Jr., Official Court Reporter, United States District Court, Northern District of Illinois, Eastern Division.



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SUPREME COURT, U. S.

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MAR 17 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 1067

MILLER BREWING COMPANY,
a Wisconsin corporation,

Appellant,

v.

THEODORE JONES as Director of Revenue
of the State of Illinois,

Appellee.

On Appeal from the Supreme Court of the State of Illinois

MOTION TO DISMISS

WILLIAM G. CLARK,
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JOHN J. O'TOOLE,
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Printed by Authority of the State of Illinois — 3M5

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Appellee.

On Appeal from the Supreme Court of the State of Illinois

MOTION TO DISMISS

Motion to Dismiss

Theodore Jones, as Director of Revenue of the State of Illinois, appellee herein, by William G. Clark, Attorney General of the State of Illinois, pursuant to Rule 16-1(b) of the Revised Rules of the Supreme Court of the United States, moves to dismiss this appeal on the ground that it does not present a substantial federal question.

ARGUMENT

I.

THIS APPEAL DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO THE TAXATION OF TANGIBLE PERSONAL PROPERTY IN INTERSTATE COMMERCE.

Miller Brewing Company, plaintiff-appellant, is in the primary business of manufacturing malt beverages which are sold through wholesale distributors and various retailers within the State of Illinois (Abst. 36.)[1] To stimulate a demand for its products, the plaintiff directed the manufacture and fabrication of certain "point of sale" advertising material (hereinafter referred to as POS) (Abst. 36).

These POS advertising items which are in issue herein were manufactured to the specifications of the plaintiff by organizations outside of the state (Abst. 38). The plaintiff paid for said items and directed their shipment to Illinois wholesale distributors (Abst. 38). Ultimately this tangible personal property was distributed to various retailers for the benefit of Miller Brewing Company (Abst. 40). No cost was assessed to either the wholesaler or retailer (Abst. 40).

The first question with which we are confronted is whether the State of Illinois may constitutionally exact a tax upon the aforementioned tangible personal property.

1.) Evidentiary references are made to the Abstract of Record in the Supreme Court of Illinois which is included in the Certified Transcript of Record in the Supreme Court of the United States.

The use of tangible personal property may be taxed where said property has been shipped into a state after it has come to rest within the territorial limits of the taxing state. 129 A. L. R. 221-239; 153 A. L. R. 609-635; 41 A. L. R. (2nd) 535-538.

In essence, the plaintiff contends that the imposition of the use tax on the aforementioned point of sale of tangible personal property, which was purchased and manufactured outside of Illinois, creates an unconstitutional burden upon interstate commerce. The cases which the plaintiff has cited as authority for this proposition are distinguishable for either the property involved therein was never within the territorial boundaries of the taxing state or it was merely in transit through said state.

The tangible personal property, which is the subject matter of this suit, falls within the taxing jurisdiction of the State of Illinois, for although it was manufactured elsewhere, it came to rest in Illinois for use and consumption. Under these circumstances, the State of Illinois could properly impose a use tax upon said POS items. The issue then becomes whether appellant can be made liable for this tax.

II.

THIS APPEAL DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO THE TAXATION OF MILLER BREWING COMPANY IN ITS EXERCISE OF A RIGHT AND POWER INCIDENT TO OWNERSHIP OF TANGIBLE PERSONAL PROPERTY IN THE STATE OF ILLINOIS.

Section 3 of the Illinois Use Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 439.3) imposes a tax upon the privilege of using tangible personal property within the State.

Section 2 of the Illinois Use Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 439.2) defines "Use" by providing in part:

> "'Use' means the exercise by *any* person of *any* right or power over tangible personal property incident to the ownership of that property. . . ." (Emphasis added.)

The question is now whether the plaintiff, in view of the facts herein, falls within the purview of Sections 2 and 3 of the Illinois Use Tax Act.

In the first instance, the Illinois Supreme Court ruled, that plaintiff which had the burden of proof on the issue did not allege sufficient facts[2] to establish that it was not the owner of these goods in Illinois. Plaintiff contracted for and directed the manufacture of the POS items (Abst. 37); expended corporate funds for their payment (Abst. 38); and directed its shipment to their wholesale distributors (Abst. 37).

They nebulously assert that they never owned the property or never intended to assert any control or use of it. The Illinois Supreme Court found they clearly originally owned it because they ordered it, paid for it, and directed its disposition. The assertion that they somehow disposed of title before the goods came into Illinois is contrary to the basic elements of corporate law for the directors and officers of a corporation may not make a gift of corporate assets. *McQuillen* v. *National Cash Register Co.*, 27 F. Supp. 639, affirmed CCA, 112 F. 2d 877; *cert*, denied, 311 U. S. 695, rehearing denied, 311 U. S. 729; *Wisconsin Department of Taxation* v. *Belle City Malleable*

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2) Illinois is a fact pleading jurisdiction. See opinion of Illinois Supreme Court.

Iron Co., 45 N. W. 2d 68 (Wisc.); 19 C. J. S. *Corporations* sec. 768. It is presumed that the corporation and its directors intended to act in a lawful manner. *Livingston* v. *Meyers*, 6 Ill. 2d 325; *Barrows* v. *Kenosha Co.*, 98 N. W. 2d 461 (*Wisc.*).

Thus this would negate any intent on the part of the plaintiff to expend such a large sum of corporate funds without title remaining in the corporation. Certainly if the goods were destroyed within the state of Illinois the insurance proceeds or casualty damages would be recouped by plaintiff; rather than the wholesale distributors receiving a $600,000.00 windfall at the expense of the plaintiff's shareholders.

The plaintiff was the owner of the property when it purchased it with corporate funds and since it did not divest itself of title by gift or pursuant to sale, it owned the property in Illinois. By necessity some right or power over the property, incident to the ownership thereof, was exercised by the plaintiff in Illinois. Therefore they are subject to the tax liability imposed by Section 3 of the Use Tax Act.

The Illinois Supreme Court, in commenting upon the position taken by Miller Brewing, stated:

> "Paragraph 14.8 of the complaint alleges that if the plaintiff at any time acquired any ownership, title or interest in and to any of the items, and we have held that it did, 'any such ownership, title or interest was relinquished by the plaintiff * * *.' Here, again, the complaint studiously fails to allege facts.
>
> "In the context of this statute, we are unaware of the meaning of an allegation that title, interest or possession has been 'relinquished.' The complaint nowhere alleges that the items were sold to the Illinois wholesale distributors or to anyone else. The allega-

tion that the plaintiff did not increase prices to its wholesalers to cover these items seems designed to negative a sale, and in the trial court the plaintiff did not argue that a sale had taken place. Similarly, there is no allegation that the items were given by the plaintiff to the Illinois wholesalers or to anyone else. The original complaint alleged that these items "are furnished gratuitously to the several independent distributors of Plaintiff." During the argument before the trial court the plaintiff refused to concede that there had been a gift, and in its amended complaint, filed after that argument, the allegation that the items were 'furnished gratuitously' was omitted.

"The complaint has been carefully drafted to avoid a plain and a simple statement of the actual transactions between the plaintiff and the wholesale distributors. Whether this was done in order to avoid taking a position that might result in the imposition of a tax upon its wholesale or retail distributors, we do not know. Like the circuit court, we must determine the legal sufficiency of the amended complaint that the plaintiff has chosen to file, and in our opinion the circuit court properly held that it failed to establish the illegality of the use tax proposed to be assessed against the plaintiff."

Arguendo, even if, as plaintiff suggests, it did not own the property, as such, within the State of Illinois, it is liable for the tax thereon if it exercised *"any"* right or power over the personal property incident to the ownership of it. It did not have to own the property to be subject to the Use Tax Act.

The question is, what is an incident of ownership?

The chief incidents of ownership of property have been defined to be the right to its possession, the right to its use and the right to its enjoyment. (73 C. J. S., *Property,* Sec. 13; *Zadworny* v. *City of Chicago,* 380 Ill. 470; *Cuneo*

v. *City of Chicago*, 379 Ill. 488.) Enjoyment has held to by synonomous with "benefit". *C. I. R.* v. *Homes Estate*, 326 U. S. 480; *Tips* v. *Bass*, 21 F. 2d 460; *In re Oglesbay's Estate*, 113 N. E. 2d 726 (Ohio).

In view of the fact that the plaintiff admits that the property was manufactured and funds expended to its ultimate benefit, it is clear that it is exercising a right over tangible personal property incident to the ownership of it and thus falls within the purview of the Use Tax Act.

It is not required that the plaintiff exercise all of the rights and powers incident to the ownership, but rather one is sufficient, and it has clearly exercised at least one of the rights incident to ownership: Enjoyment.

The plaintiff suggests that the State of Illinois has not afforded it any protection in regard to the property herein. It concludes that the State is therefore unable to tax the property. The State of Illinois offers the plaintiff or anyone in possession of these items the full protection offered to any other goods situated within the territorial jurisdiction of its boundaries. If the property were destroyed, the plaintiff could use the force of Illinois law to seek reimbursement, either from insurance or suit for property damage; if it were stolen or criminally damaged, the provisions of the Illinois Criminal Code would be applicable. Plaintiff's contention is unmeritorious.

The plaintiff has exercised a right and power incident to the ownership of tangible personal property in the State of Illinois and is therefore liable for a use tax thereon, either on the basis that it was the owner in fact of said tangible personal property or that it received a benefit from its use within the State of Illinois.

III.

THIS APPEAL DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO THE IMPOSITION OF A TWENTY-FIVE PER CENT PENALTY FOR THE FAILURE TO FILE A TAX RETURN.

Section 12 of the Use Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 439.42) and Section 12 of the Service Use Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 439.42) specifically incorporate Section 5 of the Retailers' Occupation Tax Act (Ill. Rev. Stats. 1963, Ch. 120, Par. 444) which require the imposition of a twenty-five per cent (25%) penalty where the taxpayer fails to file a return. The incorporation of Section 5 of the Retailers' Occupation Tax Act into the Use Tax Act and the Service Use Tax Act is valid and that provision is a subsisting part of the latter Acts. *Turner* v. *Wright*, 11 Ill. 2d 161, *App. dis.* 355 U. S. 65.

The plaintiff contends that this penalty is unconstitutional for it deters the average taxpayer from resorting to the courts for judicial relief and is invalid because the tax is not uniform.

The plaintiff relies upon the proposition that a penalty is unconstitutional for lack of due process if that penalty is so great as to intimidate or deter a reasonable person from resorting to the courts to test the validity of the tax. The general rule is that the liability for a penalty cannot be avoided upon the ground of the taxpayer's belief or contention entertained or made in good faith that he is not liable for the tax if the State affords an adequate opportunity for safely testing the validity of the tax without liability for a penalty. 51 Am. Jur., *Taxation*, sec. 975.

Thus the question evolves of whether the State of Illinois afforded the plaintiff any method to test the validity of the proposed assessment without incurring liability for the twenty-five per cent (25%) penalty imposed by Section 5 of the Retailers' Occupation Tax Act.

Section 2a of the Public Money Act (Ill. Rev. Stats. 1963, Ch. 127, Par. 172) permits a taxpayer to place an amount equal to the proposed assessment on deposit with the State Treasurer in a protest fund. It further provides for the filing of a claim for refund and review of the proposed assessment under the Illinois Administrative Review Act.

On June 4, 1964, the Department of Revenue audited the books and records of Miller Brewing Company in its Milwaukee offices (Abst. 40) Thereupon the plaintiff was advised of a proposed assessment in the amount of $15,-634.76 under the Illinois Use Tax Act (Abst. 41) and $2,-262.28 under the Illinois Service Use Tax Act (Abst. 44). These proposed assessments included no penalties. At this point the plaintiff could have sought relief as aforementioned under Section 2a of the Public Money Act without incurring any liability for payment of a penalty regardless of the decision on administrative review. However, plaintiff did not act but waited until it was subsequently advised of the addition of the twenty-five (25%) per cent penalty, as required by Section 5 of the Retailers' Occupation Tax Act before filing the instant action in chancery.

Thus the State of Illinois having offered alternative remedies to the plaintiff herein; one, a remedy by which it could test the validity of the tax without subjecting itself to a penalty; the constitutional requirements of due process were met and satisfied. In the case at bar the penalty imposed is as a result of the plaintiff's own choice

and the penalty itself does not deter a reasonable person from resorting to the courts to test the validity of the tax.

The Supreme Court held in relation to plaintiff's allegation:

> "In our opinion the penalty provisions do not deprive the plaintiff of its constitutional rights. As is true of many other taxes, the information from which the amount of these taxes must be computed is peculiarly within the knowledge of the taxpayer. In *Helvering* v. *Mitchell*, 303 U.S. 391, 82 L. Ed. 917, the validity of sanctions designed to ensure full and honest disclosure was sustained, and their civil rather than criminal character was recognized. The imposition of a 25% penalty for failure to file a return has been approved in many cases. (*Offutt* v. *Commissioner*, (4th cir. 1960) 276 F. 2d 471; *Henningsen* v. *Commissioner*, (4th cir, 1957) 243 F. 2d 954; *McAlpine Land & Development Co.* v. *Commissioner*, (4th cir. 1942) 126 F. 2d 163; *Noteman* v. *Welch*, (1st cir. 1939) 108 F. 2d 206.) Other than its asserted belief that it was not liable to pay the taxes, the plaintiff has shown no reason to justify its failure to file a return; similar assertions have been held ineffective to avoid a penalty for failure to file a return. See, *eg. Heman* v. *Commissioner*, (8th cir. 1960) 283 F. 2d 227, 233."

The plaintiff has been afforded alternative remedies. It chose to ignore the remedy which would bar the mandatory imposition of the twenty-five per cent (25%) penalty clause assessed herein. Rather it chose to contest the validity of the tax in the present chancery action. The penalty assessed is a result of the plaintiff's actions and that penalty under the facts herein is not unconstitutional.

CONCLUSION

In view of the foregoing, it is respectfully submitted that this appeal should be dismissed for failure to state a substantial Federal question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1067

MILLER BREWING COMPANY, a Wisconsin corporation,
Appellant,

v.

THEODORE JONES as Director of Revenue of the State of Illinois.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

PRELIMINARY STATEMENT

In response to Miller Brewing Company ("Appellant")'s Statement As To Jurisdiction, Theodore Jones as Director of Revenue of the State of Illinois (the "Revenue Director") filed a Motion To Dismiss this appeal on the ground that the Federal questions presented are not substantial. In support of that Motion, the Revenue Director argued:

> (1) The substantive (Due Process-Commerce Clause) question was correctly decided by the Illinois Supreme Court "• • • either on the basis that it [Appellant] was the owner in fact of said tangible personal property or that it received a benefit from its use within the State of Illinois." (Motion To Dismiss p. 7).

(2) The procedural penalty (Due Process) question also was correctly decided by the Illinois Supreme Court because its resolution required a simple determination as to "* * * whether the State of Illinois afforded the plaintiff *any* method [emphasis supplied] to test the validity of the proposed assessment without incurring liability for the twenty-five per cent (25%) penalty." (Motion To Dismiss p. 9).

Ordinarily a Motion To Dismiss a Jurisdictional Statement would responsively join issue on the single question of whether substantial Federal questions exist and no reply by the Appellant would be necessary. In this particular case, however, Appellant must respond because of several fanciful misstatements of fact and misleading summations of law. The Revenue Director should be without right to do these things in an attempt to have an Appeal summarily dismissed.

ARGUMENT

I

The Use Tax Assessments

Upon the question of whether the tax assessments were within the taxing power of the State of Illinois and did not violate the Due Process and Commerce Clauses of the United States Constitution, the Revenue Director states his ultimate theory supporting the propriety of those assessments as follows (Motion To Dismiss p. 7):

> "The Plaintiff has exercised a right and power incident to the ownership of tangible personal property in the State of Illinois and is therefore liable for a use tax thereon, either on the basis that it was the owner in fact of said tangible personal property or that it received a benefit from its use within the State of Illinois."

Since the theory has been disjunctively pronounced, it will be disjunctively answered.

Ownership

The Revenue Director justifies the use tax assessments principally by asserting that the Illinois Supreme Court has determined that Appellant "owned" the POS advertising items when they were located within the State of Illinois. The assertion can be dealt with upon its merits, but there is no excuse for the concurrent misstatement of fact: "Thus this [i.e., the supposed rule against making gifts of corporate assets] would negate any intent on the part of the plaintiff to expend such a large sum of corporate funds without title remaining in the corporation." (Motion To Dismiss p. 5). Whether the Revenue Director likes it or not, however, the Record conclusively and properly discloses that "• • • it was never the intent of Plaintiff to acquire title to or a property interest in said POS advertising items. • • •" (R. 3 pp. 37, 39); the Illinois Supreme Court held that Appellant owned the POS advertising items *despite* its firm intentions to the contrary and it is hot seemly to suggest otherwise in a Motion To Dismiss an appeal for insubstantiality.

In an apparent attempt to prevent this Court from inquiring into the question of "ownership" if it considers that question to be relevant, the Revenue Director observed that "Illinois is a fact pleading jurisdiction" and "[T]he Illinois Supreme Court ruled, that Plaintiff which had the burden of proof on the issue did not allege sufficient facts to establish that it was not the owner of these goods in Illinois." (Motion To Dismiss p. 4). Aside from the fact that technical concepts of "title" and "ownership" have never been considered relevant in determining the validity of state taxing questions, however, it is well settled indeed that a decision of the questions presented in this case must not be predicated upon technical deficiencies in pleadings or Illinois law concerning them (Statement As To Jurisdiction

p. 13).[1] Upon the point of "ownership", therefore, the Illinois Supreme Court has now spoken definitively only upon the question of what will be an insufficient plea of "non-ownership" as a matter of Illinois local law.[2]

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[1] *Brown* v. *Western Railway of Alabama*, 338 U.S. 294, 296: "It is contended that this construction of the Complaint is binding on us. • • • To what extent Rules of Practice and Procedure may themselves dig into 'substantive rights' is a troublesome question at best as is shown in the very case on which Respondent relies. • • • A long series of cases previously decided • • • makes it our duty to construe the allegations of this Complaint ourselves in order to determine whether Petitioner has been denied a right of trial granted him by Congress. This Federal right cannot be defeated by the forms of local practice. • • • And we cannot accept as final a State Court's interpretation of allegations in a Complaint asserting it. • • •"

Truax v. *Corrigan*, 257 U.S. 312, 324: "The facts alleged are admitted by the demurrer, and in determining their legal effect as a deprivation of Plaintiffs' legal rights under the Fourteenth Amendment, we are at ascfull liberty to consider them as was the State Supreme Court. • • • Nor does the Court's declaration that the statute is a rule of evidence bind us in such an investigation."

[2] The Federal Rule of Pleading would be contrary to the Illinois Rule. *Kirke* v. *Texas Co.*, 186 F.2d 643, 647 (7th Cir. 1951) ("No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it); *Leimer* v. *State Mutual Life Assurance Co.*, 108 F.2d 302, 306 (8th Cir. 1940) ("[W]e think there is no justification for dismissing a Complaint for insufficiency of statement, except where it appears to a certainty that the Plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.").

Such expressions are based upon the availability under the Federal Rules of Civil Procedure of a Bill of Particulars to a party confused by the pleadings of his opponent. The Illinois Civil Practice Act also would have permitted the Revenue Director to have secured a Bill of Particulars supplementing Appellant's plea of non-ownership, 110 *SHA Ill. Ann. Stat.* §37.

The Revenue Director's appeal to Illinois law of pleading and practice is really only an expediency designed to shore up the "ownership" rationale which he likes. He has not responded to the well established rules that no "form of words" will justify a particular State tax (Statement As To Jurisdiction p. 13), nor does he appear to be disturbed by cases such as the following which establish the direction of inquiry to be made by this Court in reviewing a State tax case:

> *Richfield Oil Corporation* v. *State Board of Equalization*, 329 U.S. 69, 84: "The interpretation of a State taxing statute by a State Court is '• • • not determinative of the question whether the tax deprives a taxpayer of a Federal right, which issue turns not on characterization which a State has given the tax, but on its operation and effect.'"
>
> *State Tax Commission* v. *Aldrich*, 316 U.S. 174, 182: "• • • [T]he taxing power is an incident of government. It does not derive from technical legal concepts. • • •"
>
> *Ward* v. *Krinsky*, 259 U.S. 503, 520: The United States Supreme Court is "• • • bound by *construction* of the statute adopted by the state court • • • [but] is not concluded by its *reasoning* but must exercise an independent judgment, when called upon to determine the Federal question whether the act as construed and applied, is repugnant to the restrictions of the [Fourteenth] Amendment."
>
> *Rearick* v. *Pennsylvania*, 203 U.S. 507, 512: Federal constitutional questions are "• • • not drawn from the 'witty diversities' • • • of the law of sales."

The function of a State Court in a case such as this is merely to "• • • say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks." *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 104.

Abstractly considered apart from the attempt to evade a full consideration of this case it would be difficult to comprehend why the Revenue Director has taken the position that the question of "ownership" is of any moment whatever. The Cook County Circuit Court, for example, rejected completely the question of "ownership" as being of any relevance (R. 3 p. 80):

> "THE COURT: Ownership has nothing whatever to do with it. It is a question of use, unless a user is doing it contrary to his right under the law to do so because of the owner's objection to it. I don't think purchase has anything to do with it at all. It is a question of use, pure and simple."

That position of the Circuit Court was in perfect agreement with that taken by the Revenue Director himself in arguing the case (R. 3 p. 75):

> "• • • The false premise involved [in Appellant's argument] is the assumption that the use tax cannot apply to the plaintiff if the plaintiff, Miller Brewing Company, does not own the subject property when it is in Illinois, but since the Act nowhere refers to a tax upon ownership in Illinois, plaintiff has created an illusory distinction which is without significance within the meaning of the Act.
>
> "All that matters is that plaintiff has used personal property within the definition of use in the Act, and that plaintiff has caused its property so used to be delivered and distributed throughout the State of Illinois. • • •"

Why then the attachment to the attenuated theory of "ownership" which was later developed; the answer is apparent from the Revenue Director's statement of the issues (Motion To Dismiss pp. 2, 3):

> "• • • The first question with which we are confronted is whether the State of Illinois may constitutionally exact a tax upon the aforementioned tangible personal property.

> "The tangible personal property, which is the subject matter of this suit, falls within the taxing jurisdiction of the State of Illinois, for although it was manufactured elsewhere, it came to rest in Illinois for use and consumption."

But the rationalization that for purposes of this particular case the Illinois Use Tax Act as applied can be justified as a "property" tax based upon "ownership" is itself subject to serious doubt.

McLeod v. *Dilworth Co.*, 322 U.S. 327, concerned the question whether an Arkansas tax which had been construed by the Arkansas courts as levying a sales tax and not a use tax violated the Commerce Clause of the Federal Constitution. The tax could not be sustained under the constitutional principles applicable to sales tax because all acts by the taxpayer in reference to these sales occurred outside of Arkansas (as did all acts by Appellant in reference to the POS advertising items in this case). The Arkansas taxing authorities argued alternatively, however, that the tax should be sustained as a Use Tax collection statute albeit it was called a sales tax. This Court rejected that argument (322 U.S. 327, 330):

> "* * * It is suggested * * * that Arkansas could have levied a tax for the same amount on the use of these goods in Arkansas by the Arkansas buyer, and that such a use tax would not exceed the limits upon State power derived from the United States Constitution. Whatever might be the fate of such a tax * * *, the not too short answer is that Arkansas has chosen not to impose such a use tax * * *. A sales tax and a use tax in many instances may bring about the same results, but they are different in conception, are assessments upon different transactions, and in the interlacing of the two legislative authorities within our federation they have to justify themselves on different constitutional grounds. * * *"

There is a difference between privilege taxes and property taxes and different constitutional principles are applicable to each of them. This Court once decided that the State of Minnesota had no power to tax the transfer by inheritance of obligations issued by Minnesota which were owned by a decedent who was domiciled in another state at the time of his death. *Farmers' Loan and Trust Company* v. *Minnesota*, 280 U.S. 204. Although the majority appeared to base its opinion of nontaxability upon the ultimate conclusion that the "bonds and certificates of the decedent had acquired permanent situs for taxation in New York", Mr. Justice Stone filed a concurring opinion (280 U.S. 204, 214, 215):

> "• • • [W]e are not here concerned with a property tax, but with an excise or privilege tax imposed on the transfer of an intangible • • • and to sustain a privilege tax the privilege must be enjoyed in the state imposing it • • •. It is enough, I think, to uphold the present decision that the transfer was effected in New York by one domiciled there • • •. So far as the transfer • • • is concerned, it is New York law and not that of Minnesota which, by generally accepted rules, is applied there and receives recognition elsewhere. • • • Once the bonds had passed beyond the state and were acquired by an owner domiciled elsewhere, the law of Minnesota neither protected nor could it withhold the power of transfer or prescribe its terms.
>
> "• • • [G]ranting that the continued existence of the contract rested in part on the law of Minnesota, the relation of that law to the transfer in New York, both in point of theory and in every practical aspect, appears to me to be too attenuated to constitute any reasonable basis for deeming the transfer to be within the taxing jurisdiction of Minnesota."

Since Appellant exercised privileges with respect to the POS advertising items only in states other than Illinois (R. 3 p. 37) and neither used nor controlled the use of those

items within Illinois (R. 3 p. 40), certainly the relation of Illinois law to the privileges exercised with respect to the items by Appellant "* * * both in point of theory and in every practical aspect * * * [Is] too attenuated to constitute any reasonable basis for deeming the * * * [use] to be within the taxing jurisdiction of * * * [Illinois]."

Even if a state were permitted to justify a given privilege tax by applying the principles applicable to property taxes, it must do so without fictionalizing a theory of constructive ownership. This Court's most recent rejection of such a fictional approach was in *American Oil Co.* v. *Neill*, 380 U.S. 451 (Statement As To Jurisdiction pp. 3, 12, 14, 15, 17). In that case the State of Idaho declared in the taxing statute itself that one who sold motor fuel outside of Idaho for importation into that state was "constructive recipient" of the gasoline when it was received in Idaho. Likewise, an attempt by Virginia to justify a state privilege (death) tax by declaring that the trust beneficiaries who lived in Virginia were the "real owners" of the trust corpus which was not itself within the tax jurisdiction of Virginia was rejected. *Safe Deposit and Trust Company of Baltimore* v. *Virginia*, 280 U.S. 83, 92 ("We need not make any nice inquiry concerning the ultimate or equitable ownership of the securities or the exact nature of the interest held by the son."). *Rhode Island Trust Co.* v. *Doughton*, 270 U.S. 69, held that North Carolina was without power to assess a privilege tax against a non-resident who owned shares of stock in a New Jersey corporation at the time of his death. This Court rejected North Carolina's attempt to justify the tax by arguing, alternatively, that the decedent really "owned" the assets of the corporation which were located within North Carolina when he died (270 U.S. 69, 81):

> "* * * In this case the jurisdiction of North Carolina rests on the claim that, because the New Jersey corpora-

> tion has two-thirds of its property in North Carolina, the State may treat shares of its stock as having a situs in North Carolina to the extent of the ratio in value of its property in North Carolina to all of its property. This is on the theory that the stockholders are the owners of the property of the corporation, and the state which has jurisdiction of any of the corporate property has *pro tanto* jurisdiction of his shares of stock. We cannot concur in this view. * * *"

So this Court has stood fast throughout the years against attempts by States to justify privilege taxes as property taxes in particular cases through the application of a fictitious cluster of theories of "ownership." Even if the only question presented by this case were whether this fundamental, firm position should now be abandoned, that question by itself would certainly be substantial enough to merit a full and complete consideration by this Court.

Benefit

The second, distinct theory by which the Revenue Director attempts to prevent full consideration of the use tax assessment issue of this case is that Appellant "received a benefit" from the use of the POS advertising items when they were located within the State of Illinois. Presumably this argument attempts to meet the *quid pro quo* essentials for the exercise of State taxing powers (Statement As To Jurisdiction pp. 14-15). As was true in the development of the "ownership" theories, however, no authority is supplied on the point and the Motion To Dismiss is not responsive to the Statement As To Jurisdiction.

The Motion To Dismiss, assuming that this Court will accede to the "ownership" property tax rationalization of the use tax question, urges that the *quid pro quo* would then constitute the alleged availability of the usual protections afforded by Illinois law to owners of any personal property

located within Illinois, such as the availability of the Illinois Criminal Code to pursue and punish thieves and an imaginary right to recover insurance proceeds (Motion To Dismiss p. 7). Once again there is no excuse for such a statement; the Revenue Director stubbornly and indefensibly refuses to accept this case as it is, not as he wishes it were, and the clear fact that the *only* relationship of Appellant to the POS advertising items was that it paid for their manufacture and directed—outside of Illinois—the disposition which should be made of them. Upon this specific point of insurance, he not only supplies no factual authority for the assertion but, more seriously, ignores the clear fact that "* * * [r]isk of loss during shipment was in the consignees [i.e., the Illinois wholesale distributors] and all claims for damage were to be made by the consignees." (R. 3 p. 39). In any event, this first theory of *quid pro quo* is no stronger than the substantive "ownership" rationalization itself upon which it is completely dependent.

The Revenue Director's alternative theory of *quid pro quo* does at least have the virtue of absolute simplicity (Motion To Dismiss p. 6):

> "[E]ven if, as Plaintiff suggests, it did not own the property, as such, within the State of Illinois, it is liable for the tax thereon if it exercised *'any'* right or power over the personal property incident to the ownership of it. It did not have to own the property to be subject to the use tax."

This of course was the theory upon which the assessments were originally made (R. 3 p. 41) and was the way the case originally was presented to the Circuit Court of Cook County by the Revenue Director.

Once again he unfairly misstates the facts of the case by asserting "that the plaintiff admits that the property was manufactured and the funds expended to its ultimate bene-

fit" (Motion To Dismiss p. 7). No reference is made to the Record to support that assertion, of course, but perhaps the intent is to refer to the fact that the "• • • Illinois independent wholesale distributors usually distributed the POS advertising items to various Illinois retailers who would then use said items at the point-of-sale to encourage a demand for plaintiff's malt beverage products among ultimate consumers thereof." (R. 3 p. 40).

Admittedly the POS advertising items—when and if displayed within the State of Illinois—advertised products manufactured by Appellant; but that fact does not infuse the "ultimate beneficiary" statement with meaning. The Illinois retailers and distributors—independent businessmen all—were benefited also and to a greater extent than Appellant. Indeed, it would appear that the Illinois consumers themselves were more likely to be the "ultimate beneficiaries", or perhaps, even the State of Illinois itself when it collected use taxes from them for exercising their privileges of consuming Appellant's products within Illinois. In any event, neither that unjustified assertion of "ultimate benefit" nor the multiple often metaphysical problems which could arise from it have any relevancy to the question presented by the Motion To Dismiss.

Until this point, Appellant had been confused with the following analysis of the use tax issue of this case made by the Revenue Director (Motion To Dismiss p. 3):

> "In essence, the Plaintiff contends that the imposition of the use tax on the aforementioned point-of-sale of tangible personal property [sic!], which was purchased and manufactured outside of Illinois, creates an unconstitutional burden upon interstate commerce."

From the beginning of this litigation the Revenue Director has known that it has been the primary position of Appellant that both the use tax assessment and the penalty assessment

are unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment. But, upon reflection, perhaps that statement of the "essence" of this case really is more sophisticated than it appears, because when all of the fictions are rejected and issue is joined on the facts of this case the only question remaining will indeed seriously and fundamentally challenge the integrity of the Commerce Clause itself: may the State of Illinois assess a tax against Appellant because there are located within Illinois POS advertising items which are utilized by Illinois retailers in an attempt to creat a demand for products produced by Appellant in other States?

Since benefits received from a taxing state never justify a state tax not otherwise authorized (Statement As To Jurisdiction p. 15), and the Revenue Director does not contend otherwise in his Motion To Dismiss, necessarily his point must be that the State of Illinois does have power in this case to tax the "benefit" itself. It is stated that "benefit" is the same as "enjoyment" and that this particular tax is justified because Appellant "• • • has already exercised at least one of the rights incident to ownership: Enjoyment." (Motion To Dismiss p. 7).

Without respect to whether Illinois or any other state could constitutionally assess a tax based upon "enjoyment" in the abstract in some other situation, certainly it cannot do so where the "enjoyment" tax is limited to the attempted creation of a demand within Illinois for products of Appellant which are produced only outside of Illinois and in the course of Appellant's interstate commerce activities. In *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, this Court held that a Mississippi "privilege tax" which was laid upon each person "soliciting business" for a laundry not licensed in Mississippi was invalid under the Commerce Clause. Mississippi's argument that it was simply

seeking to tax one separate and distinct "incident" and not interstate commerce itself was rejected (342 U.S. 389, 392-393):

> "• • • In the long line of 'drummer' cases, beginning with *Robbins* v. *Shelby County Taxing District*, • • • this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce. As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'interstate commerce itself knocks on the local door.' • • •."

The POS advertising items also "knock on the local door" and, indeed, are the most loyal drummers of all; uncompromised by heartbeat or other human frailties, unequivocally and absolutely dedicated to the single unswerving purpose of creating a demand in Illinois for the products Appellant manufactures in Wisconsin. Certainly if this is the "essence" of the use tax assessment question as the Revenue Director urges, it also is subtantial enough to merit full presentation and consideration.

II

The Penalty Assessments

If Illinois had chosen to make available to taxpayers "plain, speedy and efficient" remedies to contest Illinois Use Taxes and Illinois Retailers' Occupation Taxes, this case would never have developed as it did; those remedies would have been pursued with vigor. The only remedies available to Appellant—or any other taxpayer aggrieved by assessment of Illinois Use or Retailers' Occupation Taxes—however, are not, "plain, speedy and efficient" (Statement As To

Jurisdiction pp. 10, 15-16). The Revenue Director has never asserted otherwise—either in the Circuit Court of Cook County in this case where he could have moved to dismiss for failure to exhaust administrative remedies (in which case Appellant would have returned to the United States District Court as it was invited to do), or in the Motion To Dismiss which it filed in response to the Statement As To Jurisdiction now under consideration. Presumably, then, the argument of the Revenue Director is that the penalty questions are insubstantial despite the fact that the only alternative remedy available to Appellant fell below the constitutional requirements (R. 3 pp. 34-36).

The Statement As To Jurisdiction clearly discloses that the "procedural due process penalty question" presented was based in part upon the lack of any valid, understandable statute authorizing the penalty (Statement As To Jurisdiction p. 7 at II(2)). It is grossly unfair, therefore, for the statement to be made that "Section 12 of the Use Tax Act and • • • Section 12 of the Service Use Tax Act • • • specifically incorporate Section 5 of the Retailers' Occupation Tax Act which require the imposition of a twenty five per cent (25%) penalty where the taxpayer fails to file a return." (Motion To Dismiss p. 8). In point of fact, however, the statute specifically imposes penalties only against "• • • any person engaged in the business of selling tangible personal property at retail" (Statement As To Jurisdiction p. 5) and Appellant is not and has never been engaged in that business. Even if such a method of incorporating penalties by reference with incomprehensible results were not by itself a substantial question, certainly it lends a good deal of additional substance to the primary penalty question of whether the penalties attempt to close the courthouse doors to taxpayers in Illinois (Statement As To Jurisdiction pp. 15-16).

The question is not whether Illinois made available to Appellant "any remedy" (Motion To Dismiss p. 9) but rather whether the administrative remedies which it did "make available" alternative to the seeking of judicial relief met the constitutional standards. It is not appropriate for the Revenue Director nor for the Illinois Supreme Court to cite Federal cases to support the assertion that "the imposition of a twenty-five per cent (25%) penalty for failure to file a return has been approved in many cases." (Motion To Dismiss p. 10). It is almost beyond comprehension that any one would consciously draw a parallel between Illinois' administrative tax remedies and those commendable, superior administrative remedies provided in our Federal tax system. Naturally this Court may deal here only with the question of the penalty aspects of the Illinois procedures as applied in this particular case, but in doing so it might also ignite the spark which would civilize the Illinois administrative procedures. This would certainly be an impressive collateral benefit of wide social importance.

CONCLUSION

The Motion To Dismiss this appeal summarily asserts that the Federal questions presented are not substantial but no response is made to a single case preliminarily cited by Appellant in the Statement As To Jurisdiction. Instead, a series of fictions are pronounced which are not only outside of the Record but on occasion directly contrary to it.

Upon the substantive question of the constitutionality of the use tax assessments, there is nothing in the Motion To Dismiss which even casts doubt upon certain fundamental constitutional principles applicable here: (1) the State of Illinois may not tax privileges exercised only outside the State of Illinois and in the course of interstate commerce; (2) the State of Illinois may not justify its use tax as

applied here as a "property" tax on "ownership" when that supposed "ownership" is detached from fact and predicated entirely on a series of elaborate and attenuated fictions; and (3) the State of Illinois may not justify the use tax assessed here as one upon the "enjoyment" Appellant might derive from the fact that the POS advertising items located within Illinois advertise its products which are manufactured in other states.

Upon the procedural Due Process question concerning the twenty-five per cent (25%) penalties, the Motion To Dismiss likewise fails to cast doubt upon the important principle that since Illinois did not make available to Appellant "plain, speedy and efficient" administrative remedies to contest the use taxes it may not assess a penalty against Appellant for seeking judicial injunctive relief from the Illinois state courts.

Since there is nothing presented in the Motion To Dismiss which even tends to support the assertion that the Federal questions presented are not substantial, Appellant urges that the said Motion be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1067

MILLER BREWING COMPANY, a Wisconsin corporation,
Appellant,

v.

THEODORE JONES as Director of Revenue of the State of Illinois.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR REHEARING AND CERTIFICATE OF COUNSEL

To the Honorable Justices of the
Supreme Court of the United States.

The Appellant, MILLER BREWING COMPANY, a Wisconsin corporation, by its Attorneys, Frank H. Uriell and Paul A. Teschner, respectfully requests a rehearing in the above-entitled case on the ground that certain points were misapprehended or overlooked by the Court in dismissing that Appeal for lack of a substantial federal question.

PRELIMINARY STATEMENT

In dismissing the Appeal in this case for want of a substantial federal question, this Court apparently felt that the

decision of the Illinois Supreme Court was merely incorrect and that an occasional erroneous and unjust decision of a state Supreme Court, albeit violative of the federal Constitution, does not by itself infuse the questions presented with that degree of substantiality required for plenary argument and consideration. The Appellant understands that this decision of the Court is a pragmatic one and respects it as such.

In this particular case, however, the Court overlooked the substantial, adverse result which its action in dismissing for lack of a substantial federal question will have upon the Bar of the United States. Such a dismissal is inherently equivocal and in this case will cause directly an intolerable and discordant precedential dilemma for lawyers who must attempt to decide the questions presented here, to wit:

(1) *Due Process*—Is the question of whether a state may assess a tax without violating the Due Process Clause of the United States Constitution henceforth to be determined by questions of "ownership" and "title" as the Illinois Supreme Court clearly stated; or should lawyers continue to premise advice upon this Court's decisions which have rejected the "witty diversities of the law of sales" as factors with due process consequences.

(2) *Commerce Clause*—May states now assess taxes against foreign corporations measured exclusively by amounts paid outside the taxing state for one purpose and one purpose only: the attempted creation of a demand by residents of the taxing state for products produced in other states in the course of interstate commerce by the foreign corporation; or should lawyers continue to premise advice upon this Court's decisions holding that if it does nothing else the Commerce Clause jealously nurtures absolutely and keeps inviolate a national market.

POINT I

DUE PROCESS CLAUSE

Although both the Illinois Director of Revenue (R. 3 p. 75) and the Circuit Court of Cook County (R. 3 p. 80) had rejected the concept that "ownership" of the POS advertising items had any relevancy to the question of Appellant's liability for Illinois Use Tax, the Supreme Court of Illinois in fact predicated its entire decision that Appellant was liable for Illinois Use Taxes on the ground that Appellant "owned" the POS advertising items because it had paid for their production and therefore continued to own them when they were sent into Illinois; the Illinois Supreme Court considered it material that the Amended Complaint did not allege with precision a definite transfer of ownership from Appellant to its Illinois wholesale distributors. Because the facts before the Illinois Supreme Court did not, therefore, suffice to show a conscious, affirmative transference of that determined ownership to the Illinois wholesale distributors or to the Illinois Retailers, the Illinois Supreme Court concluded its opinion on that question by remarking that the "* * * Amended Complaint * * * does not assert facts that would call into operation the constitutional doctrines that it advances." (219 N.E. 2nd 494, 496; 35 Ill. 2nd, 86, 92.)

The Illinois Supreme Court's invitation of further litigation is apparent: any taxpayer in the same position as Appellant which is able to show that it has divested itself of "ownership" or "title" as a matter of fact will, in some future case, have succeeded in "calling into operation" the constitutional principles upon which this case is based. The tendency will be for some lawyers to advise clients to enter into a formalistic bill of sale or deed of gift so as to divest them-

selves, outside of Illinois, of "title" to POS advertising items. Such advice would be justified only by treating the decision of the Illinois Supreme Court as an intramural one isolated from the mainstream of decisions of this Court.

Lawyers who would be concerned with squaring their advice with the decisions of this Court, however, would be confronted by its many decisions holding that "* * * neither state courts nor state legislators by giving a specific tax a particular name or by the use of some form of words can remove the duty of the Supreme Court of the United States to consider the nature and effect of a particular tax, an inquiry which will be concerned only with the practical operation of it." (Statement As To Jurisdiction p. 13). Such lawyers would be inclined to premise advice upon the many decisions of this Court holding that states may not assess taxes unless they supply a *quid pro quo* in reference to the privilege taxed.

POINT II

COMMERCE CLAUSE

This Court's dismissal of this Appeal for lack of a substantial federal question does in point of fact result in a holding by this Court which is as follows:

> The question of whether the State of Illinois may assess a tax against a Wisconsin corporation based upon amounts paid by it to Minnesota, Wisconsin, Maryland, and California manufacturers for the cost of fabricating POS advertising items which are then (1) pursuant to directions of the Wisconsin corporation sent directly by said manufacturers to the Wisconsin corporation's independent Illinois Wholesale Distributors, and (2) displayed within Illinois for the single purpose of attempting to create a demand for the Wisconsin corporation's products, is not a substantial ques-

tion arising under the Commerce Clause of the Constitution of the United States.

If that question is not substantial, it is not important. If it is not important, it is not relevant; if it is not relevant, then the Commerce Clause is no longer a limitation upon the power of states to tax advertising communications in interstate commerce. Certainly this Court should declare such a result directly and not *subrosa*.

This Court has repeatedly held that a state may not tax a foreign corporation which pays the salaries of drummers who enter the taxing state for the sole purpose of attempting to create a demand for products produced in other states by the taxpayer and sent into the taxing state for sale. In this case, instead of salaries paid to drummers for a portion only of their services the Appellant pays for the drummers themselves, but in all other relevant respects the transactions are identical: a payment by a foreign corporation in an attempt to create a demand among residents of the taxing state for products produced outside of it and in the course of interstate commerce.

Again we have a major dilemma of substance. How will lawyers square the holdings of this Court that a state may not tax the interstate commerce which *results* from interstate advertising communications with its holding in this case that a state may nonetheless tax the amounts paid to create the demand for interstate commerce? Should lawyers assume that the decision in this case is limited to state power to tax tangible advertising devices such as display items or catalogs which are sent into the taxing state and are the only contact with it; may they not reasonably assume that this power extends to taxing amounts paid to drummers to create an interstate demand; and may not lawyers logically conclude that, because of a presumption

against discrimination between the various methods of communication, this Court here in fact empowers states to tax interstate advertising messages themselves? Are not lawyers entitled to reason, then, that states may accomplish through indirection what cannot be accomplished directly; and if the Commerce Clause is to perish by gradual encroachments, has it not been too good a friend of law and lawyers to be denied the dignity of an honest burial by this Court?

WHEREFORE, Appellant respectfully requests that this Court grant a rehearing upon the Statement As To Jurisdiction, the Motion To Dismiss, and Appellant's Brief In Opposition To Motion to Dismiss previously filed in this action.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Frank H. Uriell and Paul A. Teschner, counsel for Miller Brewing Company, Appellant herein, certify that the foregoing Petition For Rehearing has been filed in accordance with Rule 58.1 of the Rules of the Supreme Court of the United States; and that it is presented to the Court in good faith and not for purposes of delay.

/s/ Frank H. Uriell

/s/ Paul A. Teschner

Frank H. Uriell
Paul A. Teschner
Attorneys for Appellant

No. 1067 (October Term 1966)

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

MILLER BREWING COMPANY, a Wisconsin corporation,
Appellant,

v.

THEODORE JONES as Director of Revenue of the State of Illinois.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING* SECOND PETITION FOR REHEARING AND MOTION TO RECALL JUDGMENT

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* This document is limited to the intervening circumstance of the Court's issuance of its *National Bellas Hess* decision, 386 U.S. 753.

La Salle Street Press—Chicago 60610

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1067 (October Term 1966)

MILLER BREWING COMPANY, a Wisconsin corporation,
Appellant,

v.

THEODORE JONES as Director of Revenue of the State of Illinois.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

COMES NOW MILLER BREWING COMPANY, Appellant herein, by Frank H. Uriell and Paul A. Teschner, its Attorneys, and respectively moves that an order be entered herein granting Appellant leave instanter to file the Second Petition For Rehearing attached hereto and directing the Clerk to file said Second Petition For Rehearing.

The facts on which this Motion is based are as follows:

(1) On April 17, 1967, the Court granted the Illinois Revenue Director's motion to dismiss and dismissed the appeal in this case for want of a substantial Federal question. 386 U.S. 684.

(2) Thereupon Appellant filed a Petition For Rehearing which the Court denied. 387 U.S. 938.

(3) Said Petition For Rehearing was prepared before and did not reflect the issuance by the Court of its decision in *National Bellas Hess, Inc.* v. *Department of Revenue of the State of Illinois*, 386 U.S. 753; and the subsequent issuance by the Court of that decision is an intervening circumstance of substantial or controlling effect on this case.

(4) The *National Bellas Hess* case originated as did this case in Illinois and had as a fundamental issue as does this case the question whether the taxpayer owned property within the State of Illinois within the meaning of the Commerce Clause and Due Process Clause which would justify Illinois' assertion of its taxing power in the particular circumstances.

(5) On April 20, 1965, oral argument before the Circuit Court of Cook County in this case concluded with that Court's following reference to the significance, materiality, and relevancy of the ultimate disposition of the *National Bellas Hess* case to this case (R. 3, p. 81):

> "The Court: Now, I confess to you that I am very anxious to get something from the Supreme Court that will enlighten me, and maybe it will come out of the Bellas-Hess case, because that is the only one with which I am familiar now before me."

(6) The public interest will be served by the Court's reconsideration of its dismissal of this case for want of a substantial Federal question in light of the Court's subsequent holding handed down at the same Term in the *National Bellas Hess* case.

WHEREFORE, Appellant respectfully requests that this motion be granted.

SECOND PETITION FOR REHEARING

To the Honorable Justices of the
Supreme Court of the United States:

The Appellant, MILLER BREWING COMPANY, a Wisconsin corporation, by its Attorneys, Frank H. Uriell and Paul A. Teschner, respectfully requests a rehearing in the above-entitled case on the ground that the Court's decision in the case of *National Bellas Hess, Inc.* v. *Department of Revenue of the State of Illinois,* 386 U.S. 753, although issued subsequently to the Court's dismissal of this appeal, is completely inconsistent with the Court's decision in this case and is at least *prima facie* authority supporting a decision in this case in favor of Appellant.

Preliminary Statement

On April 17, 1967, the Court decided this case (386 U.S. 684) by granting the Illinois Revenue Director's Motion to Dismiss and by dismissing the appeal for want of a substantial Federal question. A Petition For Rehearing was filed in due course which was denied at 387 U.S. 938.

On May 8, 1967, the Court decided the case of *National Bellas Hess, Inc.* v. *Department of Revenue of the State of Illinois,* 386 U.S. 753. Unfortunately for Appellant, although the *National Bellas Hess* decision was issued at the same Term at which the Court's decision in this case was issued, Appellant had no knowledge of that decision when it prepared and filed its original Petition For Rehearing. Naturally Appellant does not restate here any grounds advanced in that original Petition but confines itself to the point that the decision of the Illinois Supreme Court in this case (35 Ill. 2d 86, 219 N.E. 2d 494) and this Court's decision in the *National Bellas Hess* case both pass upon the identical issue as to whether the respective taxpayers owned advertising property within the State of Illinois within the meaning of Federal constitutional limitations upon state

taxing powers; and that those two decisions, with all the relevant facts being identical, reached diametrically opposite conclusions of law.

I.

The Illinois Supreme Court's Determination That Appellant Owned Tangible Personal Property Within Illinois Is Directly Contrary To The Holding Of This Court In The *National Bellas Hess* Case.

The essence of the decision of the Illinois Supreme Court in this case is accurately summarized by the headnotes given to the case by the Official Reporter to the Illinois Supreme Court (35 Ill. 2d 86 at 86-87):

> "1. *TAXES—when brewer is owner of point-of-sale advertising material for purpose of use tax.* Where plaintiff, a manufacturer of malt beverage products, provides point-of-sale advertising material to its wholesale distributors by having the material shipped directly from out-of-state fabricators to the distributors and paying the fabricators only for materials actually shipped, it is the owner of the materials for purposes of the use tax, although it did not intend to take title and never included them in its inventory, where plaintiff caused the items to be brought into being, paid for their manufacture and exercised complete power of disposition over them."

In the *National Bellas Hess* case, the taxpayer also provided advertising material to Illinois residents by having catalogues shipped or mailed from outside of Illinois to residents within the State of Illinois. If the principle upon which the Illinois Supreme Court decided this case against Appellant were valid, therefore, this Court would necessarily have had to decide the National Bellas Hess case against the taxpayer. The reason for this is that this Court recognized that the State of Illinois would have had power to assess National Bellas Hess with the duty to collect use

taxes if it had owned property within Illinois (386 U.S. 753 at 758):

> "In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have had to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, *or property within a state*, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it." [Emphasis supplied.]

Insofar as the question of ownership of items of tangible personal property located within Illinois is concerned, the relevant facts are identical in this case with those present in the *National Bellas Hess* case. Appellant respectfully suggests that this case should be granted a plenary consideration so that a definite and definitive reconciliation can be made between this case and the decision of the Court in *National Bellas Hess.*

II.

Although *National Bellas Hess* Was Concerned With A Duty To Collect A Use Tax And This Case Is Concerned With Direct Assessment Of A Use Tax, The Same Constitutional Principles Govern.

In the *National Bellas Hess* case this Court recognized that the constitutional inquiry to be made there was precisely the same as that which should govern a final resolution of this case if plenary consideration is granted (386 U.S. 753 at 756):

> "• • • [T]he test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a state's compliance with the requirements of due process in this area are similar. • • • The same principles have been held applicable in determining the power of a State to impose the burden of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and a person, property or transaction it seeks to tax.' • • •"

And of course Appellant has properly raised both the Commerce Clause and Due Process questions on this appeal (Statement As To Jurisdiction, pp. 5-7).

III.

The Salfsame Burdens Which The Court Outlawed As Unconstitutional In *National Bellas Hess* Are Present Here And, Indeed, In More Vivid Form.

In this case, Appellant caused to be sent into Illinois point-of-sale advertising items to create a demand for its products; and since those products were themselves sold by independent Illinois retailers, they all bore their full share of Illinois Retailers' Occupation and Use Taxes. In the *National Bellas Hess* case, on the other hand, the taxpayer not only caused to be sent into Illinois advertising catalogs designed to create a demand for its products but, more significantly, sold those products from outside of Illinois in such a way that those sales did not bear their share of Illinois Retailers' Occupation and Use Taxes. Notwithstanding that, the Court held that Illinois was without power to assess amounts against *National Bellas Hess* (386 U.S. 753 at 759-760):

> "• • • [I]t is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon

> National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'
>
> "The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements. Under the Constitution this is a domain where Congress alone has the power of regulation and control."

Appellant also does business in the several States and the result of the Court's failure to grant plenary consideration to this case is precisely that which it decried in the above language. In operating its national advertising program, Appellant has hitherto been able to direct shipments of the POS advertising items to the several States unburdened by any need to allocate costs and determine destinations. Under the decision of the Illinois Supreme Court it will become necessary for Appellant to keep extensive accounting records as to the precise amounts of advertising items being sent to each of the States, the amounts paid by Appellant to the suppliers of those items, the many variations in rates of use taxes among the several States, the allowable exemptions among the several States, and records which will meet the various administrative and recordkeeping requirements of the several States. If the decision of the Illinois Supreme Court is allowed to stand without full examination by the Court, then Appellant will indeed become enmeshed "in a virtual welter of complicated

obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'" This is because the several States give Appellant nothing in return for the powers it exercises outside of their borders in directing that the advertising items be sent into their several jurisdictions.

WHEREFORE, Appellant respectfully requests that because of the intervening circumstance of and based upon the *National Bellas Hess* decision, the Court grant a rehearing upon the Statement As To Jurisdiction, the Motion To Dismiss, and Appellant's Brief In Opposition To Motion To Dismiss previously filed in this case.

MOTION TO RECALL JUDGMENT

COMES NOW MILLER BREWING COMPANY, Appellant herein, by Frank H. Uriell and Paul A. Teschner, its Attorneys, and respectfully moves that, for the aforementioned reasons, an order be entered herein recalling from the Supreme Court of Illinois the Judgment of this Court in this case and the mandate which was mailed to the Clerk of the Supreme Court of Illinois on May 29, 1967. And in support of this motion Appellant suggests as authority for this procedure the case of *Cahill* v. *New York, New Haven and Hartford Railroad Co.*, 351 U.S. 183.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Frank H. Uriell and Paul A. Teschner, counsel for Miller Brewing Company, Appellant herein, certify that the foregoing Motion For Leave To File Second Petition For Rehearing, Second Petition For Rehearing, and Motion To Recall Judgment are presented to the Court in good faith and not for the purposes of delay.

/s/ FRANK H. URIELL

/s/ PAUL A. TESCHNER

Frank H. Uriell
Paul A. Teschner

Attorneys for Appellant

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

MILLER BREWING CO. *v.* JONES.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 1067. Decided April 17, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.